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Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2014 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through March 21, 2014. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 21, 2014.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
John Marshall Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2014 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2014 supplement pamphlets and in the bound volumes of the Code.

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TITLE 17

CRIMINAL PROCEDURE

Chap.

CHAPTER 1

GENERAL PROVISIONS

17-1-4. Vacation of judgments, verdicts, rules, or orders obtained by perjury.

JUDICIAL DECISIONS

Motions

When motion to vacate fails.

Defendant was not entitled to have the defendant's convictions set aside due to alleged perjured testimony as the defendant made no showing any perjury actually occurred. Coggins v. State, 293 Ga. 864, 750 S.E.2d 331 (2013).

CHAPTER 2

JURISDICTION AND VENUE

17-2-1. Jurisdiction over crimes and persons charged with commission of crimes generally.

JUDICIAL DECISIONS

Jurisdiction established. — State had jurisdiction to prosecute the defendant for computer child exploitation because the evidence showed that after being told that the person the defendant thought was a 14-year-old girl lived in Georgia, the defendant violated O.C.G.A. § 16-12-100.2 by utilizing computer on-line services to communicate with the purported child and entice the child to meet the defendant to engage in sexual activity. Brown v. State, 321 Ga. App. 798, 743 S.E.2d 474 (2013).

State had jurisdiction to prosecute the defendant for attempted child molestation, because the defendant committed the crime at least partly within Georgia when the defendant took a substantial step in Georgia toward committing child molestation, namely by traveling to Georgia to meet with a person the defendant thought was a 14-year-old girl for the purpose of engaging in sexual activity. Brown v. State, 321 Ga. App. 798, 743 S.E.2d 474 (2013).

17-2-2. Venue generally.

JUDICIAL DECISIONS

ANALYSIS

PROOF OF VENUE

Proof of Venue

Evidence as to venue, though slight, may be sufficient.

With regard to the defendant's murder conviction, sufficient evidence was submitted to support the conclusion that the cause of the victim's death was a beating involving blows to the head and while no direct evidence was presented establishing where the beating was committed, sufficient indirect or circumstantial evidence was presented from which the jury could conclude the victim was beaten at the pull-off on a road in Harris County, Georgia, where the victim was found. Bulloch v. State, 293 Ga. 179, 744 S.E.2d 763 (2013).

Venue proved where evidence indicates crime committed in trial county.

Since there was no clear evidence that the fatal injury was inflicted anywhere other than Harris County, where the victim was found, and where the victim died, the state sufficiently proved venue. Walton v. State, 293 Ga. 607, 748 S.E.2d 866 (2013).

Body found in county, although shooting site unconfirmed.

Police officer's testimony that the burning car in which the victim's body was found was located in Fulton County was sufficient to establish venue in that county. Jackson v. State, 292 Ga. 685, 740 S.E.2d 609 (2013).

Venue needs clear proof beyond reasonable doubt.

Jury instructions set forth in O.C.G.A. § 17-2-2(c) violated the habeas petitioner's due process rights since Ga. Const. 1983, Art. VI, Sec. II, Para. V made venue an essential element of malice murder, and the instruction's mandate that jurors had to consider the cause of death to have occurred where the body was found im-

properly shifted the burden of proving otherwise onto the defendant. Owens v. McLaughlin, 733 F.3d 320 (11th Cir. 2013).

Evidence insufficient to establish venue.

State failed to present evidence of venue necessary for a fleeing and eluding conviction, as the testimony merely identified streets, but did indicate the counties in which the chase or shooting took place. Grant v. State, 2014 Ga. App. LEXIS 140 (Mar. 12, 2014).

Sufficient evidence supported the defendant's conviction for theft by taking since the evidence showed that the defendant never used the funds borrowed for relocating the Florida plant, as promised, and the loan was secured with equipment that the defendant did not own; however, the prosecution failed to prove venue was proper in Dodge County, Georgia, since although the contracts were executed in Dodge County, there was no evidence that the defendant exercised any control over the $ 350,000 in Dodge County. Davis v. State, 754 S.E.2d 815, 2014 Ga. App. LEXIS 108 (2014).

Stipulating to venue. — Pretermitting whether the decisions not to move for a directed verdict for lack of venue and to stipulate to venue fell below the objective standard of reasonableness, the defendant could not prove that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Indeed, if defense counsel either moved for a directed verdict as to the lack of venue or decided against ultimately stipulating to venue, the trial transcript clearly showed that the state was prepared to reopen the evidence to recall a witness to prove venue. Muldrow v. State, 322 Ga. App. 190, 744 S.E.2d 413 (2013).

Venue a question of fact for the jury.

Whether the state established venue was a question for a jury because the question of whether the defendant's efforts to abandon the illegal files was successful when the defendant placed the files in the trash before entering Clayton County could not be determined as a matter of law at the pretrial stage. State v. Al-Khayyal, 322 Ga. App. 718, 744 S.E.2d 885 (2013).

CHAPTER 3

LIMITATIONS ON PROSECUTION

17-3-1. Generally.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Davis v. State, 323 Ga. App. 266, 746 S.E.2d 890 (2013).

Limitation Period Application

Four year statute of limitations.

Trial court correctly concluded that the four-year statute of limitation contained in O.C.G.A. § 17-3-1(c) was applicable and that the state failed to plead and prove that the tolling provisions of O.C.G.A. § 17-3-2.2 had been triggered. Consequently, the trial court did not err in granting defendants' plea in bar. State v. Mullins, 321 Ga. App. 671, 742 S.E.2d 490 (2013).

Defendant's convictions for theft by con-

Limitation Period
Application (Cont'd)

version and a RICO violation were reversed because the state failed to carry the state's burden to prove that the defendant was indicted on the counts within the applicable statutes of limitation as the evidence showed that the victims, and therefore the state, had actual knowledge of the offenses more than five years prior to the June 12, 2009 indictment, and the state produced no evidence or argument to the contrary. Jannuzzo v. State, 322 Ga. App. 760, 746 S.E.2d 238 (2013).

Limitations period properly tolled.

Because the existence, execution, and timing of an agreement that allegedly violated the bribery statute were unknown to the state before February 2010, the statute of limitations for the bribery charge was tolled until it was discovered; and the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

Because the tolling exception to the statute of limitation applied to the failure to disclose a financial interest charge, and the prosecution for that charge was timely commenced after the crime was discovered, the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

17-3-2. Periods excluded.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Knowledge of victim as knowledge of state.

Defendant's convictions for theft by conversion and a RICO violation were reversed because the state failed to carry the state's burden to prove that the defendant was indicted on the counts within the applicable statutes of limitation as the evidence showed that the victims, and therefore the state, had actual knowledge of the offenses more than five years prior to the June 12, 2009 indictment, and the state produced no evidence or argument to the contrary. Jannuzzo v. State, 322 Ga. App. 760, 746 S.E.2d 238 (2013).

Statute of limitations not tolled.

Since two clients did not discover the defendant's theft at the time the theft occurred, the statute of limitations was tolled until discovery and those counts were not barred by the limitations period. Pennington v. State, 323 Ga. App. 92, 746 S.E.2d 768 (2013).

Statute of limitation tolled.

Because the existence, execution, and timing of an agreement that allegedly violated the bribery statute were unknown to the state before February 2010, the statute of limitations for the bribery charge was tolled until it was discovered; and the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

Because the tolling exception to the statute of limitation applied to the failure to disclose a financial interest charge, and the prosecution for that charge was timely commenced after the crime was discovered, the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

17-3-2.2. Statute of limitations.

JUDICIAL DECISIONS

Statute of limitations not tolled. — Trial court correctly concluded that the four-year statute of limitation contained in O.C.G.A. § 17-3-1(c) was applicable and that the state failed to plead and prove that the tolling provisions of O.C.G.A. § 17-3-2.2 had been triggered. Consequently, the trial court did not err in granting defendants' plea in bar. State v. Mullins, 321 Ga. App. 671, 742 S.E.2d 490 (2013).

17-3-3. Other exclusions.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

No extension of time. — O.C.G.A. § 17-3-3 did not alter the running of the statute of limitation because the statute had no application to a prosecution in which the charge was dismissed over six months before the original statute of limitations expires. State v. Outen, 324 Ga. App. 457, 751 S.E.2d 109 (2013).

CHAPTER 4

ARREST OF PERSONS

ARTICLE 2

ARREST BY LAW ENFORCEMENT OFFICERS GENERALLY

17-4-20. Authorization of arrests with and without warrants generally; use of deadly force; adoption or promulgation of conflicting regulations, policies, ordinances, and resolutions; authority of nuclear power facility security officer.

JUDICIAL DECISIONS

Analysis

General Consideration
Grounds for Warrantless Arrest
2. Offense Committed in Officer's Presence
3. Offender Endeavoring to Escape

General Consideration

Official immunity found.

In an arrest for driving under the influence, the arrestee's false imprisonment claim failed because the officer was entitled to official immunity since the officer was performing a discretionary act when the officer arrested the arrestee; the arrestee's general allegations of malice did not overcome official immunity. Bannister v. Conway, 2013 U.S. Dist. LEXIS 152569 (N.D. Ga. Oct. 23, 2013).

Grounds for Warrantless Arrest

2. Offense Committed in Officer's Presence

When officer sees crime.

Probable cause was a complete defense to an arrestee's false imprisonment claim because the arrest for burglary was made pursuant to exigent circumstances as the suspected offense was committed in the officers' presence or within the officers' immediate knowledge; the officers found the arrestee inside a vacant home and saw that the back door appeared to have been forced open. Gray v. Ector, No. 12-11323, 2013 U.S. App. LEXIS 19261 (11th Cir. Sept. 18, 2013) (Unpublished).

3. Offender Endeavoring to Escape

Deadly force used in pursuing feeing suspected felon. — Officers, who shot and killed a fleeing suspected felon armed with a knife, were entitled to official immunity because it was a discretionary act, during pursuit a bystander twice identified the suspect, and the suspect slashed a knife at one officer, posing an immediate threat of physical violence. Williams v. Boehrer, No. 12-14534, 2013 U.S. App. LEXIS 18742 (11th Cir. Sept. 10, 2013) (Unpublished).

CHAPTER 5

SEARCHES AND SEIZURES

Article 2

Searches With Warrants

ARTICLE 2

SEARCHES WITH WARRANTS

17-5-21. Grounds for issuance of search warrant; scope of search pursuant to search warrant; issuance by retired judge or judge emeritus.

Law reviews. — For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013).

JUDICIAL DECISIONS

Analysis

Sufficiency of Warrant

2. Probable Cause

Basis for determining if sufficient probable cause.

Denial of the defendant's suppression motion was error as a search warrant was based upon the statements of a confidential informant (CI) whose reliability, credibility, and source of information were unknown, law enforcement officers had failed to corroborate the CI's claim that the defendant was selling drugs from the residence, and the officers did not observe the CI's conduct before or after the controlled buy. Chatham v. State, 323 Ga. App. 51, 746 S.E.2d 605 (2013).

17-5-22. Issuance of search warrants by judicial officers generally; maintenance of docket record of warrants issued.

All warrants shall state the time and date of issuance and are the warrants of the judicial officer issuing the same and not the warrants of the court in which he is then sitting. Such warrants need not bear the seal of the court or clerk thereof. The warrant, the complaint on which the warrant is issued, the affidavit or affidavits supporting the warrant, and the returns shall be filed with the clerk of the court of the judicial officer issuing the same, or with the court if there is no clerk, at the time the warrant has been executed or has been returned "not executed"; provided, however, that the judicial officer shall keep a docket record of all warrants issued by him, and upon issuing any warrant he shall immediately record the same, within a reasonable time, on the docket. (Ga. L. 1966, p. 567, § 4; Ga. L. 1992, p. 1328, § 1; Ga. L. 2014, p. 866, § 17/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, inserted "that" in the proviso and revised punctuation.

17-5-25. Execution of search warrant generally.

JUDICIAL DECISIONS

Subsequent test or analysis of seized item. — In a sexual exploitation of children case, a defendant's computer was seized within 10 days of the issuance of a warrant as required by O.C.G.A. § 17-5-25; there was no requirement that the analysis and examination of the computer take place within the ten-day period. Mastrogiovanni v. State, 324 Ga. App. 739, 751 S.E.2d 536 (2013).

17-5-30. Motion to suppress evidence illegally seized generally.

JUDICIAL DECISIONS

Analysis

General Consideration

Standing.

Because there was no evidence that the defendant was a subscriber of the phones tapped and no evidence that the defendant's voice was heard during the wiretapped conversations, the defendant lacked standing to seek suppression of the conversations from those wiretaps. Deleon-Alvarez v. State, 324 Ga. App. 694, 751 S.E.2d 497 (2013).

Failure to file motion did not constitute ineffective assistance of counsel.

Motion to remand for a hearing to determine if the defendant had standing or if trial counsel was ineffective for failing to move for suppression of the wiretaps was denied because the defendant lacked standing to seek suppression of the evidence from the wiretaps. Deleon-Alvarez v. State, 324 Ga. App. 694, 751 S.E.2d 497 (2013).

Because the defendant's lawyer elicited testimony from the prosecution witnesses that the defendant was never identified as an owner or subscriber of the three targeted cell phones monitored, nor was the defendant ever identified as a participant of the intercepted conversations, the defendant did not have standing to pursue suppression of the wiretap evidence, and neither the defendant's trial counsel nor counsel on a motion for new trial performed deficiently for failing to raise the suppression issue. Deleon-Alvarez v. State, 324 Ga. App. 694, 751 S.E.2d 497 (2013).

Searches

4. Inventory Search

Inventory search pursuant to standard procedure. — Because the impoundment of the vehicle the defendant had been driving was reasonable and there was evidence to support the trial court's finding that the inventory search, during which bags containing marijuana and cocaine were found, was conducted pursuant to standard police procedure, the trial court's denial of the motion to suppress was not improper. Askew v. State, 755 S.E.2d 283, 2014 Ga. App. LEXIS 135 (2014).

Informants

Suppression required if informant unreliable.

Denial of the defendant's suppression motion was error as a search warrant was based upon the statements of a confidential informant (CI) whose reliability, credibility, and source of information were unknown, law enforcement officers had failed to corroborate the CI's claim that the defendant was selling drugs from the residence, and the officers did not observe the CI's conduct before or after the controlled buy. Chatham v. State, 323 Ga.

App. 51, 746 S.E.2d 605 (2013).

Applicability

1. In General

Evidence arising from first level police-citizen encounter.

Trial court erred in denying the defendant's motion to suppress because the officer lacked reasonable suspicion of criminal activity for an investigatory stop, the defendant's exercise of the right to avoid a first-tier encounter was not relevant to whether the officer had reasonable suspicion of criminal activity, and items the defendant discarded during flight were related to the illegal detention and inadmissible. Walker v. State, 323 Ga. App. 558, 747 S.E.2d 51 (2013).

Motion to suppress properly denied.

Motion to suppress was properly denied as the trial court did not err in concluding that the officer had reasonable suspicion that the driver was, or was about to be, engaged in criminal activity because the burglary to which the officer responded appeared to be in progress given that someone apparently intended to come back for the air-conditioning units stacked by the open door into the premises; the hour was late, the businesses were closed, and there was no reason for anyone to be driving to the businesses or to the empty properties; the driver was in a pick-up truck capable of transporting several air-conditioning units; and the driver quickly retreated when the driver saw the police car. The above factors were sufficient to give the officer a particularized and objective basis for a reasonable suspicion to stop the vehicle and to investigate. Waldron v. State, 321 Ga. App. 246, 741 S.E.2d 301 (2013).

5. Vehicles

C. Searches

Consensual automobile search.

Defendant's motion to suppress was properly denied because the officer had reasonable articulable suspicion to conduct a traffic stop based on an alert from the license-plate recognition system showing that a wanted person could be driving the subject vehicle, the defendant's driving on a suspended license provided probable cause for an arrest, and the defendant consented to a search of the vehicle. Hill v. State, 321 Ga. App. 817, 743 S.E.2d 489 (2013).

D. Traffic Stops

Use of information from license plate recognition system justifying stop. — State was plainly not given the required pre-hearing notice of claims that the initial stop was invalid because the license plate recognition system was not reliable under the *Harper v. State,* 249 Ga. 519, 292 S.E.2d 389 (1982) standard or because the system failed to provide the officer with reasonable suspicion; therefore, these claims of the defendant were waived and were not subject to suppression. Rodriguez v. State, 321 Ga. App. 619, 746 S.E.2d 366 (2013).

Warrants and Affidavits

Failure to tender warrant or affidavit. — Trial court erred in denying the defendant's motion to suppress because the state did not carry the state's burden to prove the validity of the warrant in that the affidavit supporting the warrant was not tendered into evidence. Smith v. State, 324 Ga. App. 542, 751 S.E.2d 164 (2013).

Warrant and affidavit in record prior to suppression hearing. — Because the testifying officer had personal knowledge concerning the existence of a valid search warrant and the warrant and supporting affidavit were in the record prior to the suppression hearing, the state met the state's burden of producing evidence showing the validity of the warrant since the defendant offered nothing in opposition, the trial court properly denied the defendant's motion to suppress. Tyre v. State, 323 Ga. App. 37, 747 S.E.2d 106 (2013).

Requirements for Motion

2. Writing

Written motion to suppress required.

Appellate court declined to consider the

Requirements for Motion (Cont'd)
2. Writing (Cont'd)

defendant's challenge to the denial of a motion to suppress because the defendant failed to present the arguments to the trial court in the written motion to suppress. Wise v. State, 321 Ga. App. 39, 740 S.E.2d 850 (2013).

Appeals

Failure to request ruling meant waiver on appeal.

Since the defendant did not challenge evidence based on an improper inventory search in the defendant's motion to suppress, the state was not given notice of the issue and the issue was waived on appeal. McBurrows v. State, 325 Ga. App. 303, 750 S.E.2d 436 (2013).

17-5-32. Search and seizure of documentary evidence in possession of attorney; exclusion of illegally obtained evidence.

(a) As used in this Code section, the term "documentary evidence" includes but is not limited to writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, X-rays, files, diagrams, ledgers, books, tapes, audio and video recordings, and papers of any type or description.

(b) Notwithstanding any other provision of law, no search and seizure without a warrant shall be conducted and no search warrant shall be issued for any documentary evidence in the possession of an attorney who is not a criminal suspect, unless the application for the search warrant specifies that the place to be searched is in the possession or custody of an attorney and also shows that there is probable cause to believe that the documentary evidence will be destroyed or secreted in the event a search warrant is not issued. This Code section shall not impair the ability to serve search warrants in cases in which the search is directed against an attorney if there is probable cause to suspect such attorney has committed a crime. This Code section shall not impair the ability to serve subpoenas on nonsuspect attorneys.

(c) In any case in which there is probable cause to believe that documentary evidence will be destroyed or secreted if a search warrant is not issued, no search warrant shall be issued or be executed for any documentary evidence in the possession or custody of an attorney who is not a criminal suspect unless:

(1) At the time the warrant is issued the court shall appoint a special master to accompany the person who will serve the warrant. The special master shall be an attorney who is a member in good standing of the State Bar of Georgia and who has been selected from a list of qualified attorneys maintained by the State Bar of Georgia. Upon service of the warrant, the special master shall inform the

party served of the specific items being sought and that the party shall have the opportunity to provide the items requested. If the party, in the judgment of the special master, fails to provide the items requested, the special master shall conduct a search for the items in the areas indicated in the search warrant;

(2) If the party who has been served states that an item or items should not be disclosed, such item or items shall be sealed by the special master and taken to the superior court for a hearing. At the hearing the party whose premises has been searched shall be entitled to raise any issues which may be raised pursuant to Code Section 17-5-30 as well as claims that the item or items are privileged or claims that the item or items are inadmissible because they were obtained in violation of this Code section. Any such hearing shall be held in the superior court;

(3) Any such warrant must, whenever practicable, be served during normal business hours. The law enforcement officer or prosecutor serving the warrant shall not participate in the search but may accompany the special master when the special master is conducting the search;

(4) Any such warrant must be served upon a party who appears to have possession or control of the items sought. If, after reasonable efforts, the party serving the warrant is unable to locate any such person, the special master shall seal and return to the court for determination by the court any items which appear to be privileged;

(5) Any such warrant shall be issued only by the superior court. At the time of applying for such a warrant, the law enforcement officer or prosecutor shall submit a written search plan designed to minimize the intrusiveness of the search. When the warrant is executed, the special master carrying out the search shall have a duty to make reasonable efforts to minimize the intrusiveness of the search.

(d) Notwithstanding any provision of law to the contrary, evidence obtained in violation of this Code section shall be excluded and suppressed from the prosecution's case-in-chief or in rebuttal, and such evidence shall not be admissible either as substantive evidence or for impeachment purposes. (Code 1981, § 17-5-32, enacted by Ga. L. 1989, p. 1687, § 1; Ga. L. 2014, p. 866, § 17/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (d).

CHAPTER 6

BONDS AND RECOGNIZANCES

ARTICLE 1

GENERAL PROVISIONS

17-6-1. Where offenses bailable; procedure; schedule of bails; appeal bonds.

(a) The following offenses are bailable only before a judge of the superior court:

(1) Treason;

(2) Murder;

(3) Rape;

(4) Aggravated sodomy;

(5) Armed robbery;

(5.1) Home invasion in the first degree;

(6) Aircraft hijacking and hijacking a motor vehicle;

(7) Aggravated child molestation;

(8) Aggravated sexual battery;

(9) Manufacturing, distributing, delivering, dispensing, administering, or selling any controlled substance classified under Code Section 16-13-25 as Schedule I or under Code Section 16-13-26 as Schedule II;

(10) Violating Code Section 16-13-31 or Code Section 16-13-31.1;

(11) Kidnapping, arson, aggravated assault, or burglary in any degree if the person, at the time of the alleged kidnapping, arson,

aggravated assault, or burglary in any degree, had previously been convicted of, was on probation or parole with respect to, or was on bail for kidnapping, arson, aggravated assault, burglary in any degree, or one or more of the offenses listed in paragraphs (1) through (10) of this subsection;

(12) Aggravated stalking; and

(13) Violations of Chapter 15 of Title 16.

(b)(1) All offenses not included in subsection (a) of this Code section are bailable by a court of inquiry. Except as provided in subsection (g) of this Code section, at no time, either before a court of inquiry, when indicted or accused, after a motion for new trial is made, or while an appeal is pending, shall any person charged with a misdemeanor be refused bail.

(2) Except as otherwise provided in this chapter:

(A) A person charged with violating Code Section 40-6-391 whose alcohol concentration at the time of arrest, as determined by any method authorized by law, violates that provided in paragraph (5) of subsection (a) of Code Section 40-6-391 may be detained for a period of time up to six hours after booking and prior to being released on bail or on recognizance; and

(B) When an arrest is made by a law enforcement officer without a warrant upon an act of family violence or a violation of a criminal family violence order pursuant to Code Section 17-4-20, the person charged with the offense shall not be eligible for bail prior to the arresting officer or some other law enforcement officer taking the arrested person before a judicial officer pursuant to Code Section 17-4-21.

(3)(A) Notwithstanding any other provision of law, a judge of a court of inquiry may, as a condition of bail or other pretrial release of a person who is charged with violating Code Section 16-5-90 or 16-5-91, prohibit the defendant from entering or remaining present at the victim's school, place of employment, or other specified places at times when the victim is present or intentionally following such person.

(B) If the evidence shows that the defendant has previously violated the conditions of pretrial release or probation or parole which arose out of a violation of Code Section 16-5-90 or 16-5-91, the judge of a court of inquiry may impose such restrictions on the defendant which may be necessary to deter further stalking of the victim, including but not limited to denying bail or pretrial release.

(c)(1) In the event a person is detained in a facility other than a municipal jail for an offense which is bailable only before a judge of

the superior court, as provided in subsection (a) of this Code section, and a hearing is held pursuant to Code Section 17-4-26 or 17-4-62, the presiding judicial officer shall notify the superior court in writing within 48 hours that the arrested person is being held without bail. If the detained person has not already petitioned for bail as provided in subsection (d) of this Code section, the superior court shall notify the district attorney and shall set a date for a hearing on the issue of bail within 30 days after receipt of such notice.

(2) In the event a person is detained in a municipal jail for an offense which is bailable only before a judge of the superior court as provided in subsection (a) of this Code section for a period of 30 days, the municipal court shall notify the superior court in writing within 48 hours that the arrested person has been held for such time without bail. If the detained person has not already petitioned for bail as provided in subsection (d) of this Code section, the superior court shall notify the district attorney and set a date for a hearing on the issue of bail within 30 days after receipt of such notice.

(3) Notice sent to the superior court pursuant to paragraph (1) or (2) of this subsection shall include any incident reports and criminal history reports relevant to the detention of such person.

(d) A person charged with any offense which is bailable only before a judge of the superior court as provided in subsection (a) of this Code section may petition the superior court requesting that such person be released on bail. The court shall notify the district attorney and set a date for a hearing within ten days after receipt of such petition.

(e) A court shall be authorized to release a person on bail if the court finds that the person:

(1) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required;

(2) Poses no significant threat or danger to any person, to the community, or to any property in the community;

(3) Poses no significant risk of committing any felony pending trial; and

(4) Poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice.

However, if the person is charged with a serious violent felony and has already been convicted of a serious violent felony, or of an offense under the laws of any other state or of the United States which offense if committed in this state would be a serious violent felony, there shall be a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the person as required or

assure the safety of any other person or the community. As used in this subsection, the term "serious violent felony" means a serious violent felony as defined in Code Section 17-10-6.1.

(f)(1) Except as provided in subsection (a) of this Code section or as otherwise provided in this subsection, the judge of any court of inquiry may by written order establish a schedule of bails and unless otherwise ordered by the judge of any court, a person charged with committing any offense shall be released from custody upon posting bail as fixed in the schedule.

(2) For offenses involving an act of family violence, as defined in Code Section 19-13-1, the schedule of bails provided for in paragraph (1) of this subsection shall require increased bail and shall include a listing of specific conditions which shall include, but not be limited to, having no contact of any kind or character with the victim or any member of the victim's family or household, not physically abusing or threatening to physically abuse the victim, the immediate enrollment in and participation in domestic violence counseling, substance abuse therapy, or other therapeutic requirements.

(3) For offenses involving an act of family violence, the judge shall determine whether the schedule of bails and one or more of its specific conditions shall be used, except that any offense involving an act of family violence and serious injury to the victim shall be bailable only before a judge when the judge or the arresting officer is of the opinion that the danger of further violence to or harassment or intimidation of the victim is such as to make it desirable that the consideration of the imposition of additional conditions as authorized in this Code section should be made. Upon setting bail in any case involving family violence, the judge shall give particular consideration to the exigencies of the case at hand and shall impose any specific conditions as he or she may deem necessary. As used in this Code section, the term "serious injury" means bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, substantial bruises to body parts, fractured bones, or permanent disfigurements and wounds inflicted by deadly weapons or any other objects which, when used offensively against a person, are capable of causing serious bodily injury.

(4) For violations of Code Section 16-15-4, the court shall require increased bail and shall include as a condition of bail or pretrial release that the defendant shall not have contact of any kind or character with any other member or associate of a criminal street gang and, in cases involving a victim, that the defendant shall not have contact of any kind or character with any such victim or any member of any such victim's family or household.

(5) For offenses involving violations of Code Section 40-6-393, bail or other release from custody shall be set by a judge on an individual basis and not a schedule of bails pursuant to this Code section.

(g) No appeal bond shall be granted to any person who has been convicted of murder, rape, aggravated sodomy, armed robbery, home invasion in any degree, aggravated child molestation, child molestation, kidnapping, trafficking in cocaine or marijuana, aggravated stalking, or aircraft hijacking and who has been sentenced to serve a period of incarceration of five years or more. The granting of an appeal bond to a person who has been convicted of any other felony offense or of any misdemeanor offense involving an act of family violence as defined in Code Section 19-13-1, or of any offense delineated as a high and aggravated misdemeanor or of any offense set forth in Code Section 40-6-391, shall be in the discretion of the convicting court. Appeal bonds shall terminate when the right of appeal terminates, and such bonds shall not be effective as to any petition or application for writ of certiorari unless the court in which the petition or application is filed so specifies.

(h) Except in cases in which life imprisonment or the death penalty may be imposed, a judge of the superior court by written order may delegate the authority provided for in this Code section to any judge of any court of inquiry within such superior court judge's circuit. However, such authority may not be exercised outside the county in which said judge of the court of inquiry was appointed or elected. The written order delegating such authority shall be valid for a period of one year, but may be revoked by the superior court judge issuing such order at any time prior to the end of that one-year period.

(i) As used in this Code section, the term "bail" shall include the releasing of a person on such person's own recognizance, except as limited by the provisions of Code Section 17-6-12.

(j) For all persons who have been authorized by law or the court to be released on bail, sheriffs and constables shall accept such bail; provided, however, that the sureties tendered and offered on the bond are approved by the sheriff of the county in which the offense was committed. (Orig. Code 1863, § 4625; Code 1868, § 4649; Code 1873, § 4747; Code 1882, § 4747; Penal Code 1895, § 933; Penal Code 1910, § 958; Ga. L. 1922, p. 51, § 1; Code 1933, § 27-901; Ga. L. 1973, p. 454, § 1; Ga. L. 1980, p. 1359, § 1; Ga. L. 1982, p. 910, § 1; Ga. L. 1983, p. 3, § 14; Ga. L. 1983, p. 358, § 1; Ga. L. 1983, p. 452, § 1; Ga. L. 1984, p. 22, § 17; Ga. L. 1984, p. 679, § 1; Ga. L. 1984, p. 760, § 1; Ga. L. 1985, p. 416, § 1; Ga. L. 1986, p. 166, §§ 1, 2; Ga. L. 1988, p. 358, § 1; Ga. L. 1989, p. 1714, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1991, p. 416, § 1; Ga. L. 1991, p. 1401, § 1; Ga. L. 1992, p. 1150, § 1; Ga. L. 1992, p. 2527, § 1; Ga. L. 1993, p. 91, § 17; Ga. L. 1993, p. 1534, § 2; Ga. L.

1994, p. 532, § 1; Ga. L. 1994, p. 1270, § .5; Ga. L. 1994, p. 1625, § 5; Ga. L. 1995, p. 379, §§ 1, 2; Ga. L. 1995, p. 989, §§ 1, 2; Ga. L. 1996, p. 1233, § 1; Ga. L. 1996, p. 1624, § 1; Ga. L. 1997, p. 143, § 17; Ga. L. 1998, p. 270, § 9; Ga. L. 1999, p. 391, § 3; Ga. L. 2000, p. 1171, § 1; Ga. L. 2006, p. 379, § 18/HB 1059; Ga. L. 2008, p. 817, § 1/HB 960; Ga. L. 2010, p. 226, § 1/HB 889; Ga. L. 2010, p. 230, §§ 8, 9/HB 1015; Ga. L. 2012, p. 899, § 8-8/HB 1176; Ga. L. 2013, p. 667, § 3/SB 86; Ga. L. 2014, p. 426, § 9/HB 770.)

The 2014 amendment, effective July 1, 2014, added paragraph (a)(5.1) and inserted "home invasion in any degree," near the middle of the first sentence of subsection (g).

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Cited in Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

17-6-15. Necessity for commitment where bail tendered and accepted; opportunity for bail; receipt of bail after commitment and imprisonment; imprisonment of person who offers bond for amount of bail set; effect upon common-law authority of court.

(a) After arrest, if bail is tendered and accepted, no regular commitment need be entered, but a simple memorandum of the fact of bail being taken shall be sufficient.

(b)(1) A reasonable opportunity shall be allowed the accused person to give bail; and, even after commitment and imprisonment, the committing court may order the accused person brought before it to receive bail. No person shall be imprisoned under a felony commitment when bail has been fixed, if the person tenders and offers to give bond in the amount fixed, with sureties acceptable to the sheriff of the county in which the alleged offense occurred; provided, however, the sheriff shall publish and make available written rules and regulations defining acceptable sureties and prescribing under what conditions sureties may be accepted. If the sheriff determines that a professional bonding company is an acceptable surety, the rules and regulations shall require, but shall not be limited to, the following:

(A) Complete documentation showing the composition of the company to be an individual, a trust, or a group of individuals, whether or not formed as a partnership or other legal entity, or a

corporation or a combination of individuals, trusts, and corporations;

(B) Complete documentation for all employees, agents, or individuals authorized to sign or act on behalf of the bonding company;

(C) Complete documentation showing that the company holds a valid business license in the jurisdiction where bonds will be written;

(D) Fingerprints and background checks of every individual who acts as a professional bondsperson as defined in Code Section 17-6-50 for the professional bonding company seeking approval;

(E) Establishment of a cash escrow account or other form of collateral as follows:

(i) For any professional bonding company that is new to the county or that has operated continuously in the county for less than 18 months, in an amount and upon terms and conditions as determined and approved by the sheriff;

(ii) Once a professional bonding company has operated continuously for 18 months or longer in the county, then any such cash escrow account or other form of collateral shall not exceed 10 percent of the current outstanding bail bond liability of the professional bonding company; and

(iii) No professional bonding company shall purchase an insurance policy in lieu of establishing a cash escrow account or posting other collateral; provided, however, that any professional bonding company which was using an insurance policy as collateral as of December 31, 2013, may continue to do so at the discretion of the sheriff.

(F) Establishment of application, approval, and reporting procedures for the professional bonding company deemed appropriate by the sheriff which satisfy all rules and regulations required by the laws of this state and the rules and regulations established by the sheriff;

(G) Applicable fees to be paid by the applicant to cover the cost of copying the rules and regulations and processing and investigating all applications and all other costs relating thereto; or

(H) Additional criteria and requirements for approving and regulating bonding companies to be determined at the discretion of the sheriff.

(2) This Code section shall not be construed to require a sheriff to accept a professional bonding company or bondsperson as a surety.

(3) This Code section shall not be construed to prevent the posting of real property bonds and the sheriff may not prohibit the posting of property bonds. Additional requirements for the use of real property may be determined at the discretion of the sheriff. The sheriff shall not prohibit a nonresident of the county from posting a real property bond if such real property is located in the county in which it is offered as bond and if such property has sufficient unencumbered equity to satisfy the sheriff's posted rules and regulations as to acceptable sureties.

(c) This Code section shall not abrogate or repeal the common-law authority of the judge having jurisdiction. (Orig. Code 1863, § 4620; Code 1868, § 4644; Code 1873, § 4742; Code 1882, § 4742; Penal Code 1895, § 922; Penal Code 1910, § 947; Code 1933, § 27-418; Ga. L. 1977, p. 346, § 1; Ga. L. 1994, p. 532, § 2; Ga. L. 2014, p. 444, § 3-1/HB 271.)

The 2014 amendment, effective July 1, 2014, in subparagraph (b)(1)(E), substituted "collateral as follows:" for "collateral in a sum and upon terms and conditions approved by the sheriff;" and added divisions (b)(1)(E)(i) through (b)(1)(E)(iii).

ARTICLE 2

SURETIES

Part 1

General Provisions

17-6-30. Fees of sureties.

(a) Sureties on criminal bonds in any court shall not charge or receive more than 15 percent of the face amount of the bond set, which amount includes the principal and all applicable surcharges, as compensation from defendants or from anyone acting for defendants; provided, however, that a surety may charge and receive a minimum of $50.00 per bonded charge or offense as compensation, regardless of whether such compensation exceeds 15 percent of the face amount of any bond set.

(b) Any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1921, p. 243, §§ 1, 8; Code 1933, §§ 27-501, 27-9903; Ga. L. 1958, p. 120, § 1; Ga. L. 1982, p. 1254, § 1; Ga. L. 1999, p. 546, § 1; Ga. L. 2006, p. 430, § 1/HB 594; Ga. L. 2014, p. 444, § 3-2/HB 271.)

The 2014 amendment, effective July 1, 2014, substituted the present provisions of subsection (a) for the former provisions, which read: "Sureties on criminal bonds in any court shall not charge or receive more than 12 percent of the face amount of the bond set in the amount of $10,000.00 or less, which amount includes

the principal and all applicable surcharges, and shall not charge or receive more than 15 percent of the face amount of the bond set in an amount in excess of $10,000.00, which amount includes the principal and all applicable surcharges, as compensation from defendants or from anyone acting for defendants."

CHAPTER 7

PRETRIAL PROCEEDINGS

ARTICLE 3

INDICTMENTS

17-7-50.1. Time for presentment of child's case to a grand jury; exception.

Law reviews. — For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013).

JUDICIAL DECISIONS

Effect of release on bail. — Mandated 180-day time limit during which the state must present the case to the grand jury does not cease to run if the juvenile is released on bail. Edwards v. State, 323 Ga. App. 864, 748 S.E.2d 501 (2013).

17-7-53.1. Quashing of second grand jury indictment or presentment bars further prosecution.

JUDICIAL DECISIONS

Nolle prossed entries.

Trial court did not abuse the court's discretion by granting the nolle prosequi as to a first indictment nor did the court err in denying the defendant's plea of former jeopardy and motion to dismiss a third indictment because under O.C.G.A. § 17-8-3, the state did not need defendant's consent to obtain an order of nolle prosequi before the case was submitted to a jury and the court had the discretion to order the nolle prosequi, instead of quashing the indictment to avoid the application of O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Trial court has discretion to order the entry of a nolle prosequi, instead of quashing the indictment, to avoid the application of O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Entries of nolle prosequi do not trigger the bar to prosecution in O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Nothing in O.C.G.A. § 17-7-53.1 evidences an intent by the Georgia General Assembly to include actions initiated by the state in the enumerated matters giving rise to application of the statutory bar to future prosecution. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

17-7-54. Form of indictment by grand jury.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Failure to narrow ranges of dates. — Trial court did not err by denying the defendant's special demurrer to Counts 1 and 2 of the indictment charging incest based on the state failing to have narrowed the ranges of dates because the evidence showed that the defendant had engaged in at least 50 individual acts of incest with an older daughter throughout the two-year time period alleged in the indictment, not just during the months the defendant identified in the defendant's brief. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

ARTICLE 4

ACCUSATIONS

17-7-70. Trial upon accusations in felony cases; trial upon accusations of felony and misdemeanor cases in which guilty plea entered and indictment waived.

JUDICIAL DECISIONS

Waiver and consent in writing is jurisdictional requirement. Defendant's conviction for aggravated assault was void for lack of jurisdiction and had to be reversed because the evidence showed that the defendant verbally waived the defendant's right to a grand jury indictment at the start of trial and a written waiver was required by O.C.G.A. § 17-7-70(a). Martinez v. State, 322 Ga. App. 63, 743 S.E.2d 621 (2013).

17-7-71. Trials of misdemeanors; trial of misdemeanor motor vehicle violations; form and contents of accusations; amendment of accusation; service of amendment upon defendant; continuances.

JUDICIAL DECISIONS

Cited in Martinez v. State, 322 Ga. App. 63, 743 S.E.2d 621 (2013).

17-7-95. Plea of nolo contendere in noncapital felony cases; imposition of sentence; use of plea in other proceedings; use of plea to effect civil disqualifications; imposition of sentence upon plea deemed jeopardy.

Law reviews. — For article, "The Misunderstood Alford Plea: A Primer," see 19 Ga. St. B.J. 8 (Aug. 2013).

ARTICLE 6

DEMURRERS, MOTIONS, AND SPECIAL PLEAS AND EXCEPTIONS

Part 1

General Provisions

17-7-110. Time for filing pretrial motions.

JUDICIAL DECISIONS

Motion untimely and no extension sought. — Trial court did not err in refusing to consider defendant's motion to suppress because the motion was untimely, the defendant failed to hire private counsel as was indicated and, even after court-appointed counsel was provided, the defendant failed to seek leave to file a motion for an extension after the 10-day filing period. Taylor v. State, 755 S.E.2d 839, 2014 Ga. App. LEXIS 110 (2014).

Special demurrers to indictment. Because the defendant did not file a special demurrer, the defendant waived the right to a special indictment. Bryant v. State, 320 Ga. App. 838, 740 S.E.2d 772 (2013).

Failure to file special demurrer to indictment waived later challenge. Trial court did not err by finding that the defendant waived the defendant's right to challenge the indictment charging the defendant with reckless driving because the defendant failed to timely file a written special demurrer. Lauderback v. State, 320 Ga. App. 649, 740 S.E.2d 377 (2013).

Cited in Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013).

17-7-112. Plea of misnomer.

JUDICIAL DECISIONS

Misnomer not sufficiently shown. Defendant Latoya Thornton's claim of misnomer and motion to quash were rejected because, contrary to the defendant's claims, the defendant had previously been arrested and booked into jail under the name Latoia Jordan. The accusation naming the defendant as Latoia Jordan therefore was sufficient because Jordan was another name by which the defendant was known. Thornton v. State, 325 Ga. App. 475, 753 S.E.2d 139 (2013).

Part 2

Insanity and Mental Incompetency

17-7-131. Proceedings upon plea of insanity or mental incompetency at time of crime.

JUDICIAL DECISIONS

Analysis

General Consideration
Jury Charge

General Consideration

Death penalty.

In a 28 U.S.C. § 2254 case in which a death penalty inmate moved for reconsideration of a district court's finding that the inmate was not mentally retarded under Georgia law, the district court remained unconvinced that it should apply the Flynn Effect to reduce the inmate's IQ scores, and even if the full four point reduction requested was applied, the inmate had credible IQ scores of 73 and 75, which were still above the score of 70 that was generally considered to demonstrate significantly subaverage intellectual functioning under Georgia law. Ledford v. Head, 2014 U.S. Dist. LEXIS 24835 (N.D. Ga. Feb. 26, 2014).

In a 28 U.S.C. § 2254 case in which a death penalty inmate moved for reconsideration of a district court's finding that the inmate was not mentally retarded under Georgia law, the case law cited by the inmate did not alter the court's perception of the evidence presented in the case, nor the court's ultimate conclusion that the inmate failed to meet the inmate's burden of proving that the inmate had adaptive deficits in two or more of the relevant areas. Ledford v. Head, 2014 U.S. Dist. LEXIS 24835 (N.D. Ga. Feb. 26, 2014).

Defendant's motion to withdraw a guilty plea, etc.

Appellate court was not persuaded that the defendant was entitled to withdraw a plea of guilty but mentally ill due to the trial court's failure to follow the procedures in O.C.G.A. § 17-7-131(b)(2), because the defendant failed to prove that withdrawal of the plea was necessary to correct a manifest injustice, having presented no evidence the defendant was harmed by entry of the plea. Poole v. State, 2014 Ga. App. LEXIS 158 (Mar. 14, 2014).

Release from not guilty by reason of insanity verdict. — Trial court erred by not releasing the defendant from the not guilty by reason of insanity verdict because the defendant rebutted the presumption of insanity and the need for continued involuntary outpatient commitment; the treating psychiatrist testified that the defendant had good insight into the defendant's condition, was coping well, was compliant, independently cared for self, and could be responsible for complying with treatment without the aid of an involuntary order. Coogler v. State, 324 Ga. App. 796, 751 S.E.2d 584 (2013).

Jury Charge

If there is no evidence to support a charge on insanity, etc.

Defendant's ineffective assistance of counsel claim failed based on the defense attorney not requesting a jury charge of not guilty by reason of insanity because the attorney testified at the hearing on the motion for a new trial that the attorney considered it but found no evidence to support such a defense theory, thus, it was reasonable trial strategy. Hosley v. State, 322 Ga. App. 425, 746 S.E.2d 133 (2013).

ARTICLE 7

DEMAND FOR TRIAL; ANNOUNCEMENT OF READINESS FOR TRIAL

17-7-170. Demand for speedy trial; service; discharge and acquittal for lack of prosecution; expiration; reversal on direct appeal; mistrial and retrial; special pleas of incompetency.

JUDICIAL DECISIONS

ANALYSIS

Timing

Defendant's demand for a speedy trial was timely filed. — Trial counsel was not ineffective because the second defendant's speedy trial demand was filed in a timely fashion. Maldonado v. State, 325 Ga. App. 41, 752 S.E.2d 112 (2013).

Discharge and Acquittal

Premature motion for acquittal. — Trial court did not err in denying the defendant's motion for discharge and acquittal because the defendant's motion was premature since the first of the two terms in which the defendant could be tried was the following term and thus the state had that term and the next succeeding term in which to try the defendant for purposes of O.C.G.A. § 17-7-170(b). Williamson v. State, 321 Ga. App. 25, 740 S.E.2d 841 (2013).

ARTICLE 8

PROCEDURE FOR SECURING ATTENDANCE OF WITNESSES AT GRAND JURY OR TRIAL PROCEEDINGS

17-7-191. Subpoena process for witnesses of defendant; when subpoenas may be extended to witnesses outside of county.

JUDICIAL DECISIONS

Full faith and credit given to out-of-state order. — Trial court did not err by requiring the defendant to proceed to trial without the source code and other requested information because the court had granted a certificate pursuant to O.C.G.A. § 24-13-94 to permit the defense an opportunity to obtain the information from the manufacturer located in Kentucky, set the case with enough time to do so, and, after the Kentucky court issued an order denying the request, which order was entitled to full faith and credit, required the defendant to proceed to trial. Phillips v. State, 324 Ga. App. 728, 751 S.E.2d 526 (2013).

CHAPTER 8

TRIAL

Article 3
Conduct of Proceedings

ARTICLE 1

GENERAL PROVISIONS

17-8-3. Entry of nolle prosequi.

JUDICIAL DECISIONS

Trial court has discretion to order the entry of a nolle prosequi, instead of quashing the indictment, to avoid the application of O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Reindictment after nolle prosequi.

Trial court did not abuse the court's discretion by granting the nolle prosequi as to a first indictment nor did the court err in denying the defendant's plea of former jeopardy and motion to dismiss a third indictment because under O.C.G.A. § 17-8-3 the state did not need the defendant's consent to obtain an order of nolle prosequi before the case was submitted to a jury and the state had the discretion to order the nolle prosequi, instead of quashing the indictment to avoid the application of O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Entries of nolle prosequi do not trigger the bar to prosecution in O.C.G.A. § 17-7-53.1. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Under O.C.G.A. § 17-8-3, the state does not need a defendant's consent to obtain an order of nolle prosequi before the case has been submitted to a jury and that the entry of such orders renders the motions to quash moot. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

Cited in Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013).

17-8-4. Procedure for trial of jointly indicted defendants; right of defendants to testify for or against one another; order of separate trials; acquittal or conviction where offense requires joint action or concurrence; number of strikes allowed defendants.

JUDICIAL DECISIONS

ANALYSIS

Separate Trials

Denial of severance proper.

Denial of the second defendant's request to sever was not erroneous because the trial court gave appropriate limiting instructions cautioning the jury that the similar transaction action could only be considered against the first defendant. Billings v. State, 293 Ga. 99, 745 S.E.2d 583 (2013).

Prejudice

Prejudice not shown.

Defendant was not prejudiced by a joint trial based on the defendant and a codefendant's similar appearance because several of the witnesses had known the defendant and the codefendants for years, others were able to identify the defendant by the defendant's distinctive clothing, and any confusion at the joint trial was

Prejudice (Cont'd)

cleared up by the one witness who confused the defendant and the codefendant and did not amount to a denial of due process; the defendant and the codefendants urged defenses that were, for the most part, consistent; and, even to the extent that the defendant and the codefendants urged antagonistic defenses, the defendant failed to show that the joint trial denied the defendant due process. Thomas v. State, 293 Ga. 829, 750 S.E.2d 297 (2013).

Application

Motion to sever in murder cases.

Trial court's refusal to sever two murder counts because the defendant was not involved in those murders was not an abuse of discretion because evidence regarding the subject murders was relevant to the gang's existence as a "criminal street gang" and to certain codefendants' participation in criminal street gang activity, and the jury was instructed on the purpose for which the evidence was offered. Morris v. State, 294 Ga. 45, 751 S.E.2d 74 (2013).

No abuse for failure to sever.

Trial court did not err in denying the defendant's motion to sever the defendant's trial from that of the codefendant as the defenses of the defendant and the codefendant were not antagonistic and the jury was instructed that the defendants were on trial only for the offenses charged in the indictment and not for any other acts or occurrences. Harrell v. State, 322 Ga. App. 115, 744 S.E.2d 105 (2013).

Trial court did not err in failing to sever the defendant's trial from that of the co-defendant as the evidence showed they acted together, the law applicable to each was the same, and the defendant failed to point to evidence that would not have been admitted in a separate trial. Coe v. State, 293 Ga. 233, 748 S.E.2d 824 (2013).

Trial court did not err in denying a motion to sever, because the law applicable to each defendant was substantially the same, the evidence showed the defendants acted together, and there was no showing of prejudice from the presentation of antagonistic defenses. Flournoy v. State, 294 Ga. 741, 755 S.E.2d 777 (2014).

Defendant failed to show that the trial court abused the court's discretion in failing to sever the defendant's trial from the co-defendant's because the defendant failed to show that the evidence may have been confusing to the jurors, especially since there were only two co-defendants involved in the case and the evidence showed that the defendant acted in concert with the co-defendant by driving the getaway vehicle. Broyard v. State, 755 S.E.2d 36, 2014 Ga. App. LEXIS 75 (2014).

ARTICLE 2

CONTINUANCES

17-8-25. Grounds for granting of continuances — Absence of witness generally.

JUDICIAL DECISIONS

Analysis

Practice and Procedure

Practice and Procedure

Absence of witness for state.

Trial court did not err by excusing the jury after an ex parte conference with the state about a problem with the state's witnesses, because the jury had not been sworn, so no jeopardy attached, the state had shown that absent witnesses were material, the trial resumed one month later, and the defendant was not surprised by the witnesses at trial. Hoke v. State, 755 S.E.2d 876, 2014 Ga. App. LEXIS 124 (2014).

Grounds for continuance not met.

Defendant did not meet the requirements for a continuance under O.C.G.A. § 17-8-25 due to the absence of the defendant's mother because the defendant did not subpoena the defendant's mother. Daniels v. State, 321 Ga. App. 748, 743 S.E.2d 440 (2013).

Trial court did not err in denying the defendant's request for a continuance based on a witness's absence as there was no evidence a subpoena for the witness existed, counsel conceded that counsel released the witness from the subpoena after the first day of trial, the defendant failed to establish the witness's place of residence or availability by the next term, and the defendant failed to provide the trial court with the facts the defendant expected the witness to prove. Janasik v. State, 323 Ga. App. 545, 746 S.E.2d 208 (2013).

ARTICLE 3

CONDUCT OF PROCEEDINGS

17-8-54. Persons in courtroom when person under age of 16 testifies concerning sexual offense.

JUDICIAL DECISIONS

Allowing child victim's psychologist to remain in court not error.

Trial court did not err in allowing a victim's advocate to accompany the first victim to the witness stand and sit by the first victim in front of the jury while the first victim testified because the trial court carefully observed the advocate's presence and demeanor during the first victim's testimony and saw no inappropriate or prejudicial conduct or behavior. Ford v. State, 322 Ga. App. 31, 743 S.E.2d 442 (2013).

Failure to object.

Defendant waived any challenge to the trial court's exclusion of the defendant's family during the victim's testimony by failing to object. Waiver aside, the challenge lacked merit, as the defendant could not show the alleged error harmed the defendant. Davis v. State, 323 Ga. App. 266, 746 S.E.2d 890 (2013).

Closed proceedings proper.

Trial court properly cleared the courtroom while the two minor victims testified at the defendant's trial for child molestation as O.C.G.A. § 17-8-54 authorized the trial court to clear the courtroom and, to the extent the trial court improperly required persons excepted from § 17-8-54 to leave as well, the defendant waived appellate review by not objecting. Tolbert v. State, 321 Ga. App. 637, 742 S.E.2d 152 (2013).

17-8-55. Testimony of child less than seventeen years old outside physical presence of accused.

(a) As used in this Code section, the term "child" means an individual who is under 17 years of age.

(b) This Code section shall apply to all proceedings when a child is a witness to or an alleged victim of a violation of Code Section 16-5-1, 16-5-20, 16-5-23, 16-5-23.1, 16-5-40, 16-5-70, 16-5-90, 16-5-95, 16-6-1, 16-6-2, 16-6-3, 16-6-4, 16-6-5, 16-6-5.1, 16-6-11, 16-6-14, 16-6-22, 16-6-22.1, 16-6-22.2, 16-8-41, or 16-15-4.

(c) The court, upon the motion of the prosecuting attorney or the parent, legal guardian, or custodian of a child, or on its own motion,

shall hold an evidentiary hearing to determine whether a child shall testify outside the physical presence of the accused. Such motion shall be filed, or requested by the court, at least ten days prior to trial unless the court shortens such time period for good cause, as it deems just under the circumstances.

(d) The court may order a child to testify outside the physical presence of the accused, provided that the court finds by a preponderance of the evidence that such child is likely to suffer serious psychological or emotional distress or trauma which impairs such child's ability to communicate as a result of testifying in the presence of the accused. In determining whether a preponderance of the evidence has been shown, the court may consider any one or more of the following circumstances:

(1) The manner of the commission of the offense being particularly heinous or characterized by aggravating circumstances;

(2) The child's age or susceptibility to psychological or emotional distress or trauma on account of a physical or mental condition which existed before the alleged commission of the offense;

(3) At the time of the alleged offense, the accused was:

(A) The parent, guardian, legal custodian, or other person responsible for the custody or care of the child at the relevant time; or

(B) A person who maintains or maintained an ongoing personal relationship with such child's parent, guardian, legal custodian, or other person responsible for the custody or care of the child at the relevant time and the relationship involved the person living in or frequent and repeated presence in the same household or premises as the child;

(4) The alleged offense was part of an ongoing course of conduct committed by the accused against the child over an extended period of time;

(5) A deadly weapon or dangerous instrument was used during the commission of the alleged offense;

(6) The accused has inflicted serious physical injury upon the child;

(7) A threat, express or implied, of physical violence to the child or a third person if the child were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer, or law enforcement office concerning the incident has been made by or on behalf of the accused;

(8) A threat, express or implied, of the incarceration of a parent, relative, or guardian of the child, the removal of the child from the family, or the dissolution of the family of the child if the child were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer, or law enforcement office concerning the incident has been made by or on behalf of the accused;

(9) A witness other than the child has received a threat of physical violence directed at such witness or to a third person by or on behalf of the accused, and the child is aware of such threat;

(10) The accused, at the time of the inquiry:

(A) Is living in the same household with the child;

(B) Has ready access to the child; or

(C) Is providing substantial financial support for the child; or

(11) According to expert testimony, the child would be particularly susceptible to psychological or emotional distress or trauma if required to testify in open court in the physical presence of the accused.

(e) A court order allowing or not allowing a child to testify outside the physical presence of the accused shall state the findings of fact and conclusions of law that support the court's determination. An order allowing the use of such testimony shall:

(1) State the method by which such child shall testify;

(2) List any individual or category of individuals allowed to be in the presence of such child during such testimony, including the individuals the court finds contribute to the welfare and well-being of the child during his or her testimony;

(3) State any special conditions necessary to facilitate the cross-examination of such child;

(4) State any condition or limitation upon the participation of individuals in the child's presence during such child's testimony;

(5) Provide that the accused shall not be permitted to be in the physical presence of a child during his or her testimony if the accused is pro se;

(6) Provide that if counsel for the accused or the accused is precluded from being physically present during the child's testimony, then the prosecuting attorney shall likewise be precluded from being physically present; and

(7) State any other condition necessary for taking or presenting such testimony.

(f) The method used for allowing a child to testify outside the physical presence of the accused shall allow the judge, jury, and accused to observe the demeanor of the child as if he or she were testifying in the courtroom. When such testimony occurs it shall be transmitted to the courtroom by any device or combination of devices capable of projecting a live visual and oral transmission, including, but not limited to, a two-way closed circuit television broadcast, an Internet broadcast, or other simultaneous electronic means. The court shall ensure that:

(1) The transmitting equipment is capable of making an accurate transmission and is operated by a competent operator;

(2) The transmission is in color and the child is visible at all times;

(3) Every voice on the transmission is audible and identified;

(4) The courtroom is equipped with monitors which permit the jury, the accused, and others present in the courtroom to see and hear the transmission; and

(5) The image and voice of the child, as well as the image of all other persons other than the operator present in the testimonial room, are transmitted live. (Code 1981, § 17-8-55, enacted by Ga. L. 2014, p. 205, § 1/HB 804.)

Effective date. — This Code section became effective July 1, 2014.

Editor's notes. — Ga. L. 2014, p. 205, § 1/HB 804, effective July 1, 2014, repealed former Code Section 17-8-55, pertaining to testimony of child ten years old or younger by closed circuit television, and enacted the present Code section. The former Code section was based on Ga. L. 1985, p. 1190, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1991, p. 1377, § 1.

17-8-57. Expression or intimation of opinion by judge as to matters proved or guilt of accused.

JUDICIAL DECISIONS

Analysis

General Consideration

Comments four years after verdict. — Judge's comment on the latent fingerprint cards, four years after the verdict, was not an opinion on guilt in violation of O.C.G.A. § 17-8-57. Moore v. State, 293 Ga. 676, 748 S.E.2d 419 (2013).

Comments regarding pretrial procedure. — Although the trial court's comments to the jury venire three weeks prior to their service may have come close to commenting on the defendant's guilt or innocence, they were made to explain the procedure leading up to the jurors' service and thus, did not necessitate a new trial. Hicks v. State, 755 S.E.2d 855, 2014 Ga. App. LEXIS 114 (2014).

Expression of opinion about witness's credibility.

Trial court's admonition to defense counsel and instructions to the jury to disregard defense counsel's challenge to an officer's credibility clearly intimated the court's opinion that the officer's testimony was believable and violated O.C.G.A. § 17-8-57, and the purported curative instruction did not eradicate the trial court's inappropriate comments. Wilson v. State, 755 S.E.2d 253, 2014 Ga. App. LEXIS 87 (2014).

No violation by judge.

At defendant's trial for drug possession and sale, O.C.G.A. § 17-8-57 was not violated when the trial judge commented on the sufficiency of the evidence because the purpose of § 17-8-57 is to prevent the jury from being influenced, and the jury was not present at the time of the remarks. Clowers v. State, 324 Ga. App. 264, 750 S.E.2d 169 (2013).

Plain error doctrine not applicable. — Defendant was not entitled to a plain error review of a colloquy at trial, held outside the jury's presence, between the court and a witness called by the state who was reluctant to testify because the alleged error did not involve error in the sentencing phase of a trial resulting in the death penalty, in a trial judge's expression of opinion to the jury, or in the jury charge. Solomon v. State, 293 Ga. 605, 748 S.E.2d 865 (2013).

Cited in Martinez v. State, 325 Ga. App. 267, 750 S.E.2d 504 (2013).

Inquiries by the Judge

Inquiry of witness for clarification.

Because the presiding judge's questions about how the defendant shot backwards and how many shots the defendant fired were interposed to clarify the defendant's testimony and to develop the truth in the defendant's case, the superior court erred in finding that the questions constituted a violation of this statute, and the defendant was not entitled to a new trial on that basis. State v. Nickerson, 324 Ga. App. 576, 749 S.E.2d 768 (2013).

Trial court did not violate O.C.G.A. § 17-8-57 when the court questioned a witness at trial about a prior statement to police because the question only asked for clarification of whom the witness was referring to when the witness used a plural pronoun and did not express or intimate an opinion regarding the credibility of the evidence being offered or the guilt of the accused. Alexander v. State, 294 Ga. 345, 751 S.E.2d 408 (2013).

Judge's expression that detectives conduct was "quite all right". — Trial court violated O.C.G.A. § 17-8-57 in commenting to the jury that it was "quite all right" for detectives to provide false information to a suspect during a custodial interview to "test" the suspects; the trial court went beyond ruling that defense counsel's question was argumentative to gratuitously commenting on the propriety of the lead detective's technique. Haymer v. State, 323 Ga. App. 874, 747 S.E.2d 512 (2013).

Expression of opinion as to an uncontested and undisputed fact concerning Intoxilyzer. — When the trial court made the court's comments regarding the history of the Intoxilyzer, defense counsel expressly agreed with the comments and then went on to clarify counsel's question about the history of the Intoxilyzer to the patrol officer. As such, the statement by the trial court concerning a fact that was uncontested or was not in dispute did not constitute a violation of O.C.G.A. § 17-8-57. Rolland v. State, 321 Ga. App. 661, 742 S.E.2d 482 (2013).

Rulings by the Judge

Lack of appellate jurisdiction for improper questioning by judge. — Because the defendant did not file either a cross-appeal to the state's appeal or a separate notice of appeal regarding the superior court's adverse rulings on the other alleged violations of the statute regarding the presiding judge's allegedly improper questioning of the defendant, the appellate court lacked jurisdiction to consider the defendant's allegations of error arising from the superior court's adverse rulings. State v. Nickerson, 324 Ga. App. 576, 749 S.E.2d 768 (2013).

Jury Charges and Curative Instructions

Charge on impeachment.

Trial judge's charge to jury on impeach-

Jury Charges and Curative Instructions (Cont'd)

ment of a witness by a prior conviction did not amount to an improper comment on the evidence as the prior conviction was undisputed and the charge did not require the jury to disbelieve the defendant's testimony based on the prior conviction. Coleman v. State, 325 Ga. App. 700, 753 S.E.2d 449 (2014).

Explanation of rule of sequestration. — Trial court judge did not violate O.C.G.A. § 17-8-57 by expressing an opinion in providing the explanation of the rule of sequestration because it was not a prohibited expression of opinion, was not a comment on the credibility of any of the witnesses, and was a neutral explanation of the rule of sequestration that did not favor either party. Booker v. State, 322 Ga. App. 257, 744 S.E.2d 429 (2013).

Instruction limiting jury's consideration of testimony. — Trial court's jury instructions did not violate O.C.G.A. § 17-8-57 because the instructions limiting the evidence that the jury could consider from a detective's testimony did not express or intimate the trial court's opinion with regard to the defendant's guilt or innocence. Graves v. State, 322 Ga. App. 24, 743 S.E.2d 582 (2013).

17-8-58. Objections to jury charges prior to the jury retiring to deliberate; failure to raise objections.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATIONS
APPELLATE REVIEW

General Considerations

No plain error by giving jury charge on entire definition of trafficking. — Trial court did not commit plain error by charging the jury on the entire definition of trafficking as no evidence was introduced at trial suggesting that the defendant brought the cocaine at issue into the state, sold the cocaine, or that the defendant delivered the cocaine to anyone; rather, the evidence showed only that the defendant was in knowing possession of the cocaine for a brief period of time, thus, there was no reasonable possibility that the jury convicted the defendant of trafficking in a manner not charged in the indictment. Hernandez-Garcia v. State, 322 Ga. App. 455, 745 S.E.2d 706 (2013).

Cited in Stacey v. State, 292 Ga. 838, 741 S.E.2d 881 (2013); Mathis v. State, 293 Ga. 35, 743 S.E.2d 393 (2013); Ferguson v. State, 322 Ga. App. 565, 745 S.E.2d 784 (2013); Fleming v. State, 324 Ga. App. 481, 749 S.E.2d 54 (2013); Harris v. State, 324 Ga. App. 411, 750 S.E.2d 721 (2013); McBurrows v. State, 325 Ga. App. 303, 750 S.E.2d 436 (2013); Long v. State, 324 Ga. App. 882, 752 S.E.2d 54 (2013); Pitchford v. State, 294 Ga. 230, 751 S.E.2d 785 (2013); Gilliland v. State, 755 S.E.2d 249, 2014 Ga. App. LEXIS 86 (2014).

Appellate Review

No plain error found.

Failure to charge the jury on accident did not amount to plain error because the evidence did not warrant such a charge; the only evidence of unintentional touching occurred in the context of typical family play wholly unrelated to the incidents for which the defendant was convicted. Haithcock v. State, 320 Ga. App. 886, 740 S.E.2d 806 (2013).

Trial counsel's failure to object to a jury instruction on prior consistent statements did not amount to plain error because the instruction did not affect the outcome of the trial since such an instruction does not explicitly direct the jury to place any additional weight on prior consistent statements beyond that which the law already gives them. Gaither v. State, 321 Ga. App. 643, 742 S.E.2d 158 (2013).

Under a plain error analysis in the defendant's trial for murder, the trial

court did not err when the court failed to charge the jury that one acting in defense of self has no duty to retreat because the jury charges given in the case fairly informed the jury as to the law of self-defense and the defendant failed to affirmatively show that the failure to charge on the duty to retreat probably affected the outcome of the trial. Shaw v. State, 292 Ga. 871, 742 S.E.2d 707 (2013).

Trial court did not commit reversible error by failing to instruct the jury on the defense of accident because, as to the count for child molestation by showing the first victim photos of nude persons and persons performing sexual acts, the defendant claimed that the defendant never committed such an act and, thus, could not claim it was an accident, and as to the other two counts, any error in failing to give such an instruction was not plain because the charge given fairly instructed the jury that the jury had a duty to acquit the defendant if the jury determined the state failed to prove the defendant's guilt beyond a reasonable doubt. Ogletree v. State, 322 Ga. App. 103, 744 S.E.2d 96 (2013).

Trial court did not commit plain error as to the jury charge regarding malice murder and felony murder because the defendant failed to demonstrate that the alleged error in the jury charge likely affected the outcome of the proceedings since the defendant was not convicted of either malice murder or felony murder. Booker v. State, 322 Ga. App. 257, 744 S.E.2d 429 (2013).

Defense counsel was not ineffective for failing to request a charge on accomplice corroboration because the accomplice was not the only witness; thus, there was no plain error in failing to give the accomplice corroboration charge since the state relied on other evidence apart from the accomplice's testimony. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

Plain error doctrine not applicable. — Defendant was not entitled to plain error review of a colloquy at trial, held outside the jury's presence, between the court and a witness called by the state who was reluctant to testify, because the alleged error did not involve error in the sentencing phase of a trial resulting in the death penalty, in a trial judge's expression of opinion to the jury, or in the jury charge. Solomon v. State, 293 Ga. 605, 748 S.E.2d 865 (2013).

No failure to distinguish between civil and criminal liability. — Trial court did not commit plain error with regard to the instruction on reckless driving and reckless disregard by purportedly failing to sufficiently distinguish between civil and criminal as reviewing both the recharge and the initial charge together the appellate court failed to see how the jury was confused to the extent that the defendant was convicted on a lower level of criminal intent. Lauderback v. State, 320 Ga. App. 649, 740 S.E.2d 377 (2013).

ARTICLE 4

CONDUCT AND ARGUMENT OF COUNSEL

17-8-71. Order of argument after evidence presented.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Ineffectiveness of counsel.

Defendant failed to establish ineffective assistance of counsel on the ground that trial counsel called the defendant as the only defense witness because under the version of O.C.G.A. § 17-8-71 in effect at the time of trial, a criminal defendant had the right to make the final closing argument to the jury if the defendant presented no evidence; thus, it was a reason-

General Consideration (Cont'd)

able trial strategy not to present evidence in order to preserve the right to close and despite that initial strategy being defeated when one of the codefendants introduced documentary evidence, the defendant failed to demonstrate that trial counsel failed to perform effectively once the trial strategy changed mid-trial. Bulloch v. State, 293 Ga. 179, 744 S.E.2d 763 (2013).

17-8-73. Time limits on closing argument — Noncapital and capital felony cases.

JUDICIAL DECISIONS

Ineffective assistance.

As to the defendant's habeas claim that the defendant's trial counsel was ineffective for failing to use counsel's entire two hours for closing argument as provided in O.C.G.A. § 17-8-73, because kidnapping with bodily injury was a capital offense, but counsel believed counsel only had 30 minutes, there was no showing that trial counsel could have convinced the jury that the client was innocent of the crimes charged. Wilkerson v. Hart, 294 Ga. 605, 755 S.E.2d 192 (2014).

17-8-75. Improper statements by counsel.

JUDICIAL DECISIONS

Analysis

General Consideration
Rebuke of Counsel, Instruction of Jury, or Grant of Motion by Court

General Consideration

Cited in Johnson v. State, 293 Ga. 641, 748 S.E.2d 896 (2013).

Rebuke of Counsel, Instruction of Jury, or Grant of Motion by Court

Improper remark of prosecutor not cured by instruction. — General curative instruction given by the trial court after the prosecutor made an improper statement about the defendant's link to an earlier gang-related shooting during closing arguments was an inadequate curative measure and did not serve to remove the improper impression for the jurors' minds as required by O.C.G.A. § 17-8-75. Jones v. State, 292 Ga. 656, 740 S.E.2d 590 (2013).

Prosecutor's remark not improper.

Instruction pursuant to O.C.G.A. § 17-8-75 was not required as the state's references in closing argument were to the psychologist's forensic findings and the inferences thereto, not to any opinion as to the veracity of the victim. Thompson v. State, 321 Ga. App. 756, 743 S.E.2d 446 (2013).

17-8-76. Argument to or in front of jury as to possibility of clemency.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Ineffective assistance of counsel claim procedurally barred. — Defendant's claim that trial counsel was ineffective for failing to object to the prosecutor's improper closing argument that life did not mean life was procedurally barred because the defendant did not raise it in the motion for new trial and did not obtain a ruling on the motion by the trial court. Cowart v. State, 294 Ga. 333, 751 S.E.2d 399 (2013).

Objection and motion for mistrial after prosecutor's argument ended was untimely. — Defendant's objection and motion for mistrial, made after the prosecutor's improper closing argument that life did not mean life ended, were not timely and were not preserved for appeal. Cowart v. State, 294 Ga. 333, 751 S.E.2d 399 (2013).

CHAPTER 9

VERDICT AND JUDGMENT GENERALLY

ARTICLE 1

GENERAL PROVISIONS

17-9-1. When direction of verdict of acquittal authorized; when motion for directed verdict of acquittal allowed; effect of motion upon defendant's right to present evidence and right to jury trial; assent of jury not required.

JUDICIAL DECISIONS

Analysis

Application

Application

Distinction between legally insufficient evidence and verdict against weight of evidence. — Trial court's review of the evidence under O.C.G.A. § 5-5-21 differs from the court's review of the evidence on a motion for a directed verdict under O.C.G.A. § 17-9-1. In the latter case, the trial court has a duty to grant a directed verdict of acquittal when there is no conflict in the evidence and it clearly demands a verdict of acquittal as a matter of law. Lavertu v. State, 325 Ga. App. 709, 754 S.E.2d 663 (2014).

Directed verdict in shoplifting cases.

Trial court did not err by denying the defendant's motion for a directed verdict of acquittal with regard to the defendant's trial for felony shoplifting because the testimony of the store's loss prevention

Application (Cont'd)

officer established each element of the crime and provided sufficient evidence to support the conviction. Parham v. State, 320 Ga. App. 676, 739 S.E.2d 135 (2013).

17-9-4. Validity of judgment rendered by court having no jurisdiction of person or subject matter.

JUDICIAL DECISIONS

Merger claims cannot be deemed waived. — Merger claims cannot be waived, even following a guilty plea, because a conviction that merges as a matter of law or fact with another conviction is void, and any resulting sentence is void and illegal, which means that the sentences may be challenged in any proper proceeding. Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

ARTICLE 3

AMENDMENT AND IMPEACHMENT OF VERDICT

17-9-40. Amendment of verdict after dispersion of jury.

JUDICIAL DECISIONS

Juror's affidavit should not have been considered to impeach a verdict. — Habeas court erred in setting aside a murder conviction based on claims that counsel was ineffective in failing to challenge an alternate juror, who was seated after the juror had been excused and had researched the case on the Internet, because the juror's affidavit should not have been considered to impeach the verdict, pursuant to O.C.G.A. § 17-9-40, and the research was not the type of conduct that deprived the petitioner of a fair trial. O'Donnell v. Smith, 294 Ga. 307, 751 S.E.2d 324 (2013).

ARTICLE 4

MOTIONS IN ARREST

17-9-61. Time and grounds for motion generally.

JUDICIAL DECISIONS

Cited in Fouts v. State, 322 Ga. App. 261, 744 S.E.2d 451 (2013); Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

CHAPTER 10

SENTENCE AND PUNISHMENT

Article 1

Procedure for Sentencing and Imposition of Punishment

ARTICLE 1

PROCEDURE FOR SENTENCING AND IMPOSITION OF PUNISHMENT

17-10-1. Fixing of sentence; suspension or probation of sentence; change in sentence; eligibility for parole; prohibited modifications; exceptions.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration

Application to felony public indecency conviction. — Because the defendant's sex offender registration as part of probation was limited to the maximum sentence allowed by law as punishment for that crime, the trial court did not improperly give the defendant an indeterminate sentence by requiring the defendant to register as a sexual offender following the defendant's conviction for felony public indecency. Loya v. State, 321 Ga. App. 430, 740 S.E.2d 382 (2013).

Motion to vacate sentence was untimely filed.

Sentencing court lacked jurisdiction over the defendant's motion to vacate the defendant's sentence because the motion was filed three years after sentencing and the defendant did not assert a claim that the sentence was void, meaning that it was a sentence that the law did not allow. von Thomas v. State, 293 Ga. 569, 748 S.E.2d 446 (2013).

Cited in Parham v. State, 320 Ga. App. 676, 739 S.E.2d 135 (2013); Myrick v. State, 325 Ga. App. 607, 754 S.E.2d 395 (2014).

Modification of Sentence

Modification of conditions of probation.

Trial court did not err in denying the defendant's motion to vacate the defendant's sentence because the probation modification did not constitute punishment since the trial court retained jurisdiction to modify or change the probated sentence and changing the no violent contact order to no contact was not punishment but, rather, was for the purpose of

Modification of Sentence (Cont'd)

protecting the victim. Bell v. State, 323 Ga. App. 751, 748 S.E.2d 114 (2013).

17-10-3. Punishment for misdemeanors generally.

(a) Except as otherwise provided by law, every crime declared to be a misdemeanor shall be punished as follows:

(1) By a fine not to exceed $1,000.00 or by confinement in the county or other jail, county correctional institution, or such other places as counties may provide for maintenance of county inmates, for a total term not to exceed 12 months, or both;

(2) By confinement under the jurisdiction of the Board of Corrections in a state probation detention center or diversion center pursuant to Code Sections 42-8-35.4 and 42-8-35.5, for a determinate term of months which shall not exceed a total term of 12 months; or

(3) If the crime was committed by an inmate within the confines of a state correctional institution, by confinement under the jurisdiction of the Board of Corrections in a state correctional institution or such other institution as the Department of Corrections may direct for a term which shall not exceed 12 months.

(b) Either the punishment provided in paragraph (1) or (2) of subsection (a) of this Code section, but not both, may be imposed in the discretion of the sentencing judge. Misdemeanor punishment imposed under either paragraph may be subject to suspension or probation. The sentencing courts shall retain jurisdiction to amend, modify, alter, suspend, or probate sentences under paragraph (1) of subsection (a) of this Code section at any time, but in no instance shall any sentence under the paragraph be modified in a manner to place a county inmate under the jurisdiction of the Board of Corrections, except as provided in paragraph (2) of subsection (a) of this Code section.

(c) In all misdemeanor cases in which, upon conviction, a six-month sentence or less is imposed, it is within the authority and discretion of the sentencing judge to allow the sentence to be served on weekends by weekend confinement or during the nonworking hours of the defendant. A weekend shall commence and shall end in the discretion of the sentencing judge, and the nonworking hours of the defendant shall be determined in the discretion of the sentencing judge; provided, however, that the judge shall retain plenary control of the defendant at all times during the sentence period. A weekend term shall be counted as serving two days of the full sentence. Confinement during the nonworking hours of a defendant during any day may be counted as serving a full day of the sentence.

(d) In addition to or instead of any other penalty provided for the punishment of a misdemeanor involving a traffic offense, or punish-

ment of a municipal ordinance involving a traffic offense, with the exception of habitual offenders sentenced under Code Section 17-10-7, a judge may impose any one or more of the following sentences:

(1) Reexamination by the Department of Driver Services when the judge has good cause to believe that the convicted licensed driver is incompetent or otherwise not qualified to be licensed;

(2) Satisfactory completion of a defensive driving course or defensive driving program approved by the Department of Driver Services;

(3) Within the limits of the authority of the charter powers of a municipality or the punishment prescribed by law in other courts, imprisonment at times specified by the court or release from imprisonment upon such conditions and at such times as may be specified; or

(4) Probation or suspension of all or any part of a penalty upon such terms and conditions as may be prescribed by the judge. The conditions may include driving with no further motor vehicle violations during a specified time unless the driving privileges have been or will be otherwise suspended or revoked by law; reporting periodically to the court or a specified agency; and performing, or refraining from performing, such acts as may be ordered by the judge.

(e) Any sentence imposed under subsection (d) of this Code section shall be reported to the Department of Driver Services as prescribed by law.

(f) The Department of Corrections shall lack jurisdiction to supervise misdemeanor offenders, except when the sentence is made concurrent to a probated felony sentence. Except as provided in this subsection, the Department of Corrections shall lack jurisdiction to confine misdemeanor offenders.

(g) This Code section will have no effect upon any offender convicted of a misdemeanor offense prior January 1, 2001, and sentenced to confinement under the jurisdiction of the Board of Corrections or to the supervision of the Department of Corrections. (Orig. Code 1863, § 4209; Ga. L. 1865-66, p. 233, § 2; Code 1868, §§ 4245, 4608; Code 1873, §§ 4310, 4705; Ga. L. 1878-79, p. 54, § 1; Code 1882, §§ 4310, 4705; Ga. L. 1895, p. 63, § 2; Penal Code 1895, § 1039; Ga. L. 1908, p. 1119, § 1; Penal Code 1910, § 1065; Code 1933, § 27-2506; Ga. L. 1956, p. 161, § 4; Ga. L. 1957, p. 477, § 5; Ga. L. 1964, p. 485, § 1; Ga. L. 1970, p. 236, § 10; Ga. L. 1972, p. 600, § 1; Ga. L. 1974, p. 361, § 1; Ga. L. 1974, p. 631, § 1; Ga. L. 1976, p. 210, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 1992, p. 3221, § 2; Ga. L. 1997, p. 1526, § 1; Ga. L. 2000, p. 1643, § 1; Ga. L. 2001, p. 1030, § 2; Ga. L. 2002, p. 415, § 17; Ga. L. 2005, p. 334, § 7-4/HB 501; Ga. L. 2014, p. 710, § 1-3/SB 298.)

The 2014 amendment, effective July 1, 2014, substituted the present provisions of paragraph (d)(2) for the former provisions, which read: "Attendance at, and satisfactory completion of, a driver improvement course meeting standards approved by the court;".

Law reviews. — For note, "Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors' Prison System," see 48 Ga. L. Rev. 227 (2013).

17-10-6.1. Punishment for serious violent offenders; authorization for reduction in mandatory minimum sentencing.

(a) As used in this Code section, the term "serious violent felony" means:

(1) Murder or felony murder, as defined in Code Section 16-5-1;

(2) Armed robbery, as defined in Code Section 16-8-41;

(3) Kidnapping, as defined in Code Section 16-5-40;

(4) Rape, as defined in Code Section 16-6-1;

(5) Aggravated child molestation, as defined in subsection (c) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (d) of Code Section 16-6-4;

(6) Aggravated sodomy, as defined in Code Section 16-6-2; or

(7) Aggravated sexual battery, as defined in Code Section 16-6-22.2.

(b)(1) Except as provided in subsection (e) of this Code section, any person convicted of the serious violent felony of kidnapping involving a victim who is 14 years of age or older or armed robbery shall be sentenced to a mandatory minimum term of imprisonment of ten years, and no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court.

(2) Except as provided in subsection (e) of this Code section, the sentence of any person convicted of the serious violent felony of:

(A) Kidnapping involving a victim who is less than 14 years of age;

(B) Rape;

(C) Aggravated child molestation, as defined in subsection (c) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (d) of Code Section 16-6-4;

(D) Aggravated sodomy, as defined in Code Section 16-6-2; or

(E) Aggravated sexual battery, as defined in Code Section 16-6-22.2

shall, unless sentenced to life imprisonment, be a split sentence which shall include a mandatory minimum term of imprisonment of 25 years, followed by probation for life, and no portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court.

(3) No person convicted of a serious violent felony shall be sentenced as a first offender pursuant to Article 3 of Chapter 8 of Title 42, relating to probation for first offenders, or any other provision of Georgia law relating to the sentencing of first offenders. The State of Georgia shall have the right to appeal any sentence which is imposed by the superior court which does not conform to the provisions of this subsection in the same manner as is provided for other appeals by the state in accordance with Chapter 7 of Title 5, relating to appeals or certiorari by the state.

(c)(1) Except as otherwise provided in subsection (c) of Code Section 42-9-39, for a first conviction of a serious violent felony in which the accused has been sentenced to life imprisonment, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles until that person has served a minimum of 30 years in prison. The minimum term of imprisonment shall not be reduced by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections.

(2) For a first conviction of a serious violent felony in which the accused has been sentenced to death but the sentence of death has been commuted to life imprisonment, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles until that person has served a minimum of 30 years in prison. The minimum term of imprisonment shall not be reduced by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections.

(3) For a first conviction of a serious violent felony in which the accused has been sentenced to imprisonment for life without parole, that person shall not be eligible for any form of parole or early release administered by the State Board of Pardons and Paroles or for any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections.

(4) Except as otherwise provided in this subsection, any sentence imposed for the first conviction of any serious violent felony shall be

served in its entirety as imposed by the sentencing court and shall not be reduced by any form of parole or early release administered by the State Board of Pardons and Paroles or by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the period of incarceration ordered by the sentencing court; provided, however, that during the final year of incarceration an offender so sentenced shall be eligible to be considered for participation in a department administered transitional center or work release program.

(d) For purposes of this Code section, a first conviction of any serious violent felony means that the person has never been convicted of a serious violent felony under the laws of this state or of an offense under the laws of any other state or of the United States, which offense if committed in this state would be a serious violent felony. Conviction of two or more crimes charged on separate counts of one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

(e) In the court's discretion, the judge may depart from the mandatory minimum sentence specified in this Code section for a person who is convicted of a serious violent felony when the prosecuting attorney and the defendant have agreed to a sentence that is below such mandatory minimum.

(f) Any sentence imposed pursuant to this Code section shall not be reduced by any earned time, early release, work release, leave, or other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the period of incarceration ordered by the sentencing court or any form of pardon, parole, or commutation of sentence by the State Board of Pardons and Paroles; provided, however, that during the final year of incarceration, a defendant so sentenced shall be eligible to be considered for participation in a Department of Corrections administered transitional center or work release program. (Code 1981, § 17-10-6.1, enacted by Ga. L. 1994, p. 1959, § 11; Ga. L. 1998, p. 180, § 2; Ga. L. 2006, p. 379, § 20/HB 1059; Ga. L. 2009, p. 64, § 1/SB 193; Ga. L. 2009, p. 223, § 3/SB 13; Ga. L. 2011, p. 752, § 17/HB 142; Ga. L. 2013, p. 222, § 8/HB 349; Ga. L. 2014, p. 866, § 17/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, substituted "however, that during" for "however, during" in paragraph (c)(4).

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

17-10-6.2. Punishment for sexual offenders.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

JUDICIAL DECISIONS

First offender consideration not appropriate. — Because the defendant was not entitled to first offender treatment for the crimes of child molestation and enticing a child for indecent purposes, to which the defendant pled guilty, the defendant's claims that trial counsel was deficient for misinforming the defendant about the defendant's eligibility for and failing to request first offender treatment were without merit. Harris v. State, 325 Ga. App. 568, 754 S.E.2d 148 (2014).

No application to attempted crimes. — With regard to the defendant's conviction for criminal attempt to commit child molestation and related crimes, the trial court did not err by refusing to follow the guidelines set forth in O.C.G.A. § 17-10-6.2 for sexual offenses because the statute only applied to completed crimes, not to attempted crimes. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

17-10-7. Punishment of repeat offenders; punishment and eligibility for parole of persons convicted of fourth felony offense.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration
Allegation and Proof of Prior Convictions
Probation or Suspension

General Consideration

Recidivist sentence was erroneous. — Trial court erred by sentencing the defendant as a recidivist because the defendant's one prior conviction could not serve as the basis for both the failure of a registered sex offender to report a change in residence count and the recidivist sentence. Pardon v. State, 322 Ga. App. 393, 745 S.E.2d 658 (2013).

Discretion in imposition of sentence.

In a case in which the defendant was convicted of possession of cocaine with the intent to distribute, the trial court did not err in concluding that the court lacked the discretion to suspend or probate any portion of the defendant's mandatory ten-year minimum sentence because, at sentencing, the state presented evidence that the defendant had three prior felony convictions, including one for possession of cocaine with the intent to distribute; in such cases, the court of appeals had held that O.C.G.A. § 17-10-7(c) required the trial court to impose a mandatory minimum ten-year sentence, no part of which could be probated. Thomas v. State, 321 Ga. App. 214, 741 S.E.2d 298 (2013).

Ten-year sentence for shoplifting appropriate. — In applying the statute for imposition of recidivist sentencing, based on the defendant's four prior felony drug convictions, the trial court had no discretion with regard to the term of the sentence and was required to sentence the defendant to 10 years, which was the maximum sentence for theft by shoplift-

General Consideration (Cont'd)

ing. Allen v. State, 325 Ga. App. 752, 754 S.E.2d 795 (2014).

Cited in McCowan v. State, 325 Ga. App. 509, 753 S.E.2d 775 (2014).

Allegation and Proof of Prior Convictions

Allegation and proof of prior convictions generally.

Trial court erred in sentencing the defendant as a recidivist under O.C.G.A. § 17-10-7 because the trial court did not admit into the record two certified copies of the defendant's prior convictions tendered by the state or a third copy that the prosecution had been waiting to receive from the clerk's office, and defense counsel did not waive the requirement that the convictions be proven by the state. Tanksley v. State, 323 Ga. App. 299, 743 S.E.2d 585 (2013).

Proof of validity of prior guilty plea.

Remand for further sentencing proceedings was necessary, because the state was not given an opportunity to show that a prior conviction, based on a guilty plea, upon which the state relied during sentencing was constitutional. Grant v. State, 2014 Ga. App. LEXIS 140 (Mar. 12, 2014).

Probation or Suspension

Sentencing when offenses merged. — Trial court vacated the conviction and sentence for voluntary manslaughter recognizing correctly that the voluntary manslaughter should have merged into the felony murder. The only sentence that survives is the sentence for murder, and the trial court never pronounced a sentence pursuant to O.C.G.A. § 17-10-7(c) for that crime, nor does the written sentencing order reflect that the defendant is parole ineligible. Grimes v. State, 293 Ga. 559, 748 S.E.2d 441 (2013).

17-10-9. Specification by judge imposing sentence of time from which penal sentence to run; effect of appeal.

JUDICIAL DECISIONS

Credit for time served.

Trial court erred in sentencing the defendant by specifying that the defendant's credit for time served would not begin until December 5, 2008, the date probation for another offense expired because a trial judge has no authority to interfere with the administrative duties of the correctional custodians and the Georgia Department of Corrections to determine and award credit for time served. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

17-10-9.1. Voluntary surrender to county jail or correctional institution; release of defendant.

(a) When a defendant who pleads nolo contendere or guilty or is convicted of an offense against the laws of this state other than:

(1) Treason;

(2) Murder;

(3) Rape;

(4) Aggravated sodomy;

(5) Armed robbery;

(5.1) Home invasion in any degree;

(6) Aircraft hijacking and hijacking of a motor vehicle;

(7) Aggravated child molestation;

(8) Manufacturing, distributing, delivering, dispensing, administering, selling, or possessing with intent to distribute any controlled substance classified under Code Section 16-13-25 as Schedule I or under Code Section 16-13-26 as Schedule II;

(9) Violating Code Section 16-13-31, relating to trafficking in cocaine or marijuana;

(10) Kidnapping, arson, or burglary in any degree if the person, at the time such person was charged, has previously been convicted of, was on probation or parole with respect to, or was on bail for kidnapping, arson, aggravated assault, burglary in any degree, or one or more of the offenses listed in paragraphs (1) through (9) of this subsection;

(11) Child molestation;

(12) Robbery;

(13) Aggravated assault; or

(14) Voluntary manslaughter

is sentenced to a term of confinement in a county jail or a correctional institution operated by or under the jurisdiction and supervision of the Department of Corrections, the sentencing judge may release the defendant pending the defendant's surrendering to a county jail or to a correctional institution designated by the Department of Corrections as authorized in this Code section. The sentencing court may release the defendant on bond or may release the defendant on the defendant's personal recognizance. This Code section shall not be construed to limit the court's authority in prescribing conditions of probation.

(b) Any defendant who has been released on bond and who has complied with all of the conditions of the bond and any other defendant who, in the opinion of the sentencing judge, is deemed worthy of the procedure to surrender voluntarily, may be eligible to participate in the program. However, the sentencing judge shall be the sole and final arbiter concerning eligibility and the defendant shall have no right to appeal such decision.

(c) When a defendant submits a request to the sentencing judge to be allowed to surrender voluntarily to a county jail or a correctional facility, the judge may consider the request and if, taking into the consideration the crime for which the defendant is being sentenced, the history of the defendant, and any other factors which may aid in the decision, the judge determines that the granting of the request will pose

no threat to society, the defendant shall be remanded to the supervision of a probation officer by the judge and ordered to surrender voluntarily to a county jail designated by the court or to a correctional institution as thereafter designated by the Department of Corrections. The surrender date shall be a date thereafter specified as provided in subsection (d) of this Code section. The sentence of any defendant who is released pursuant to this Code section shall not begin to run until such person surrenders to the facility designated by the court or by the department, provided that such person will receive credit toward his sentence for time spent in confinement awaiting trial as provided in Code Section 17-10-11.

(d) In the event the defendant is ordered to surrender voluntarily to a county jail, the court shall designate the date on which the defendant shall surrender, which date shall not be more than 120 days after the date of conviction. When the sentencing judge issues an order requiring a defendant to surrender voluntarily to a correctional institution, the Department of Corrections shall authorize the commitment and designate the correctional institution to which the defendant shall report and the date on which the defendant is to report, which date shall not be more than 120 days after the date of conviction. Upon such designation, the department shall notify the supervising probation officer who shall notify the defendant accordingly. Subsistence and transportation expenses en route to the correctional institution shall be borne by the defendant.

(e) The provisions of this Code section shall not apply to any defendant convicted of a capital felony.

(f) If the defendant fails to surrender voluntarily as directed and required, the defendant may be charged with the offense of bail jumping pursuant to subsection (a) of Code Section 16-10-51 or the offense of escape pursuant to paragraph (3) of subsection (a) of Code Section 16-10-52 and, if convicted of such crimes, shall be punished as provided by law; or may be cited for contempt of court by the sentencing judge and, if convicted of contempt, the defendant shall be punished as provided in Code Section 15-6-8.

(g) The Department of Corrections is authorized and directed to promulgate such rules and regulations as may be necessary to effectuate the purposes of this Code section. (Code 1981, § 17-10-9.1, enacted by Ga. L. 1989, p. 607, § 1; Ga. L. 1994, p. 1625, § 6; Ga. L. 2012, p. 899, § 8-10/HB 1176; Ga. L. 2014, p. 426, § 10/HB 770.)

The 2014 amendment, effective July 1, 2014, added paragraph (a)(5.1).

17-10-12. Affidavit specifying number of days spent in confinement; disposition of affidavit; granting of credit to defendant.

JUDICIAL DECISIONS

Judge has no authority to interfere with credit issued by administrative entities. — Trial court erred in sentencing the defendant by specifying that the defendant's credit for time served would not begin until December 5, 2008, the date probation for another offense expired because a trial judge has no authority to interfere with the administrative duties of the correctional custodians and the Georgia Department of Corrections to determine and award credit for time served. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

17-10-16.1. Seeking death penalty not prerequisite to life without parole sentence.

JUDICIAL DECISIONS

State was permitted to seek a sentence of life without parole since the murder occurred one year after the law was changed to permit such a sentence. Heywood v. State, 292 Ga. 771, 743 S.E.2d 12 (2013).

ARTICLE 2

DEATH PENALTY GENERALLY

17-10-30. Procedure for imposition of death penalty generally.

Law reviews. — For annual survey on death penalty, see 65 Mercer L. Rev. 93 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration
Aggravating Circumstances
4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances

General Consideration

Cited in Humphrey v. Nance, 293 Ga. 189, 744 S.E.2d 706 (2013); Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013).

Aggravating Circumstances

4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances

Beating of victim before or after death would support depravity of mind. — In defendant's capital murder trial, counsel was not ineffective for failing to call a forensic pathologist to counter the state's pathologist's testimony that the victim was alive from a gunshot wound when the victim was severely beaten, which supported two aggravating circumstances for the death penalty under O.C.G.A. § 17-10-30(b)(2), and (b)(7), because even if the victim was dead when beaten, that evidence would have supported a finding of depravity of mind.

Aggravating Circumstances (Cont'd)
4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances (Cont'd)

(11th Cir. 2014).

Terrell v. GDCP Warden, 744 F.3d 1255

17-10-35. Review of death sentences by Supreme Court; forwarding of record and transcript; scope of review; written briefs and oral argument; similar cases to be included in decision; direct appeal to be consolidated with sentence review.

Law reviews. — For annual survey on death penalty, see 65 Mercer L. Rev. 93 (2013).

CHAPTER 12

LEGAL DEFENSE FOR INDIGENTS

Article 1

Georgia Public Defender Standards Council

ARTICLE 1

GEORGIA PUBLIC DEFENDER STANDARDS COUNCIL

17-12-7. Councilmembers; responsibilities; voting; removal; quorum; meetings; officers; expenses.

(a) All members of the council shall at all times act in the best interest of indigent defendants who are receiving legal representation under the provisions of this chapter.

(b) All members of the council shall be entitled to vote on any matter coming before the council unless otherwise provided by law or by rules adopted by the council concerning conflicts of interest.

(c) Each member of the council shall serve until a successor has been appointed. Removal of councilmembers shall be for cause and shall be in accordance with policies and procedures adopted by the council.

(d) Unless otherwise provided in this article, a quorum shall be a majority of the members of the council who are then in office, and

decisions of the council shall be by majority vote of the members present, except that a majority of the entire council shall be required to approve the appointment of the chairperson and for annual approval of an alternative delivery system pursuant to Code Section 17-12-36 and other matters as set forth in Code Section 17-12-36. The vote of two-thirds of the members of the entire council shall be required to remove the chairperson of the council or to overturn the director's decision regarding the removal of a circuit public defender.

(e) The council shall meet at least quarterly and at such other times and places as it deems necessary or convenient for the performance of its duties.

(f) The council shall elect a chairperson and such officers from the members of the council as it deems necessary and shall adopt such rules for the transaction of its business as it desires. The chairperson and officers shall serve for a term of two years and may be removed without cause by a vote of two-thirds of the members of the entire council and for cause by a majority vote of the entire council. The chairperson shall retain a vote on all matters except those in which the chairperson has a conflict of interest or the removal of the chairperson for cause. The council shall keep and maintain minutes of all council meetings.

(g) The members of the council shall receive no compensation for their services but shall be reimbursed for their actual expenses incurred in the performance of their duties as members of the council. Any expenses incurred by the council shall be paid from the general operating budget of the council. (Code 1981, § 17-12-7, enacted by Ga. L. 2003, p. 191, § 1; Ga. L. 2011, p. 91, § 4/HB 238; Ga. L. 2014, p. 866, § 17/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, revised language in subsection (c).

CHAPTER 14

RESTITUTION AND DISTRIBUTION OF PROFITS TO VICTIMS OF CRIMES

ARTICLE 1

RESTITUTION

17-14-2. Definitions.

JUDICIAL DECISIONS

Restitution is limited by thefts during time period alleged in accusation. — Trial court erred in ordering restitution for $260,637 for thefts from defendant's employer over a 12-year period because the accusation covered only a two-year period during which $57,000 was taken; under O.C.G.A. §§ 17-14-2(2) and 17-14-10, restitution was limited to damages which the victim could recover in a civil action, based on the same act. Vaughn v. State, 324 Ga. App. 289, 750 S.E.2d 375 (2013).

Cited in Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

17-14-6. Setoff of prior total or partial restitution made to victim; reduction of award from the Crime Victims Compensation Board by the amount of restitution; payment of restitution to governmental entities that have compensated the victim.

JUDICIAL DECISIONS

Reduction not authorized by codefendant's payment when victims not made whole. — Defendant was not entitled to a reduction in the amount of restitution the defendant owed by the $5,300 the codefendant paid in restitution under O.C.G.A. § 17-14-6 because together the parties were only ordered to pay $30,000, and the evidence showed the defendants stole $43,000 from the victims. Polly v. State, 323 Ga. App. 893, 748 S.E.2d 696 (2013).

Restitution award not supported by evidence. — Trial court erred in ordering the defendant to pay restitution in the amount of $7,584.35 to the Crime Victim Compensation Program and $1,000 in token restitution to the victim because the record contained no evidence to support the awards as the state presented no evidence supporting the court's request for $7,584.35, and the record did not show that the trial court considered the factors outlined in O.C.G.A. § 17-14-10(a) before requiring restitution as a condition of probation. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

17-14-7. Right of offender to offer restitution plan to ordering authority; consideration and adoption of plan; hearing to determine restitution; burden of proof; liability among multiple offenders; payment for multiple victims; waiver of victim's rights.

JUDICIAL DECISIONS

Restitution order proper.

Order of restitution was upheld as the testimony of the victim, an IT professional, as to the value of the stolen computer equipment was reasonable and, while the victim's valuation of the non-computer related items was less clear, the victim's testimony allowed the trial court to find that the victim's valuations of those items were based on eBay prices for used items. Although the evidence was insufficient to support an award for the value of the victim's hand tools and jar of coins, the fair market value of the other non-computer items was sufficient to support the restitution award. Galimore v. State, 321 Ga. App. 886, 743 S.E.2d 545 (2013).

17-14-10. Factors to be considered by ordering authority in determining nature and amount of restitution.

JUDICIAL DECISIONS

Factors not considered. — Trial court erred in ordering the defendant to pay restitution in the amount of $7,584.35 to the Crime Victim Compensation Program and $1,000 in token restitution to the victim because the record contained no evidence to support the awards as the state presented no evidence supporting the state's request for $7,584.35, and the record did not show that the trial court considered the factors outlined in O.C.G.A. § 17-14-10(a) before requiring restitution as a condition of probation. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

Restitution is limited by thefts during time period alleged in accusation. — Trial court erred in ordering restitution for $260,637 for thefts from the defendant's employer over a 12-year period because the accusation covered only a two-year period during which $57,000 was taken; under O.C.G.A. §§ 17-14-2(2) and 17-14-10, restitution was limited to damages which the victim could recover in a civil action based on the same act. Vaughn v. State, 324 Ga. App. 289, 750 S.E.2d 375 (2013).

Cited in Galimore v. State, 321 Ga. App. 886, 743 S.E.2d 545 (2013).

CHAPTER 15

VICTIM COMPENSATION

17-15-1. Legislative intent.

The General Assembly recognizes that many innocent persons suffer personal physical injury, serious mental or emotional trauma, severe financial hardship, or death as a result of criminal acts or attempted criminal acts. The General Assembly finds and determines that there is a need for assistance for such victims of crimes. Accordingly, it is the General Assembly's intent that under certain circumstances, aid, care, and assistance be provided by the state for such victims of crimes. (Code 1981, § 17-15-1, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 2009, p. 195, § 1/SB 172; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, substituted "crimes" for "crime" in the second and third sentences and inserted a comma after "circumstances" in the third sentence.

17-15-2. Definitions.

As used in this chapter, the term:

(1) "Board" means the Criminal Justice Coordinating Council.

(2) "Claimant" means any person filing a claim pursuant to this chapter.

(3) "Crime" means:

(A) An act which is committed in this state; in a state which does not have a victims' compensation program, if the claimant is a resident of this state; or in a state which has compensated the claimant in an amount less than the claimant would be entitled to pursuant to this chapter, if the claimant is a resident of this state, and which constitutes:

(i) Hit and run in violation of Code Section 40-6-270;

(ii) Homicide by vehicle in violation of Code Section 40-6-393;

(iii) Serious injury by vehicle in violation of Code Section 40-6-394;

(iv) A violation of Code Section 16-5-46;

(v) A violation of Chapter 6 of Title 16;

(vi) A violation of Part 2 of Article 3 of Chapter 12 of Title 16;

(vii) A violation of Code Section 16-5-70;

(viii) Aggravated assault with the intent to rape in violation of Code Section 16-5-21;

(ix) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or

(x) Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense;

(B) An act which constitutes international terrorism as defined in 18 U.S.C. Section 2331 against a resident of this state when such resident was outside the territorial boundaries of the United States when such act was committed; or

(C) An act of mass violence involving a resident of this state when such resident was outside the territorial boundaries of the United States when such act was committed.

(4) "Direct service provider" means a public or nonprofit entity which provides aid, care, and assistance.

(5) "Director" means the director of the Criminal Justice Coordinating Council.

(6) "Forensic medical examination" means an examination provided to a person pursuant to subsection (c) of Code Section 16-6-1 or subsection (c) of Code Section 16-6-2 by trained medical personnel in order to gather evidence. Such examination shall include, but shall not be limited to:

(A) An examination for physical trauma;

(B) A determination as to the nature and extent of the physical trauma;

(C) A patient interview;

(D) Collection and evaluation of the evidence collected; and

(E) Any additional testing deemed necessary by the examiner in order to collect evidence and provide treatment.

(7) "Fund" means the Georgia Crime Victims Emergency Fund.

(8) "Investigator" means an investigator of the board.

(9) "Serious mental or emotional trauma" means a nonphysical injury which has been documented by a licensed mental health professional and which meets the specifications promulgated by the board's rules and regulations relating to this type of trauma. (Code 1981, § 17-15-2, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1994, p. 1800, § 1; Ga. L. 1997, p. 481, § 1; Ga. L. 2002, p. 843, § 2; Ga. L. 2009, p. 195, § 2/SB 172; Ga. L. 2011, p. 214, § 4/HB 503; Ga. L. 2011, p. 217, § 4/HB 200; Ga. L. 2012, p. 775, § 17/HB 942; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, rewrote subparagraph (3)(A); substituted the present provisions of subparagraph (3)(B) for the former provisions, which read: "An act which constitutes international terrorism as defined in 18 U.S.C. Section 2331 which results in physical injury, serious mental or emotional trauma, or death to the victim, if the victim is a resident of this state and is outside the territorial boundaries of the United States when such act is committed; or"; substituted the present provisions of subparagraph (3)(C) for the former provisions, which read: "An act of mass violence which results in physical injury, serious mental or emotional trauma, or death to the victim, if the victim is a resident of this state and is outside the territorial boundaries of the United States when such act is committed."; deleted "to a victim" at the end of paragraph (4); and deleted former paragraph (10), which read: "'Victim' means a person who:

"(A) Is injured physically, who dies, or who suffers financial hardship as a result of being injured physically as a direct result of a crime;

"(B) Suffers a serious mental or emotional trauma as a result of being threatened with a crime which could result in physical injury or death;

"(C) Suffers a serious mental or emotional trauma as a result of being present during the commission of a crime; or

"(D) Suffers a serious mental or emotional trauma as a result of being trafficked for labor or sexual servitude as defined in Code Section 16-5-46."

17-15-3. Georgia Crime Victims Compensation Board; members; director of Criminal Justice Coordinating Council.

(a) There is created the Georgia Crime Victims Compensation Board. The Criminal Justice Coordinating Council created under Chapter 6A of Title 35 shall serve as the Georgia Crime Victims Compensation Board.

(b) The Governor shall appoint the director of the Criminal Justice Coordinating Council to carry out the provisions of this chapter. (Code 1981, § 17-15-3, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 2426, § 1; Ga. L. 1994, p. 1800, § 2; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, deleted former subsection (a), which read: "The five-member Georgia Crime Victims Compensation Board in existence on June 30, 1992, is abolished." and redesignated former subsections (b) and (c) as present subsections (a) and (b), respectively.

17-15-4. Powers of board.

(a) The board shall have the following powers and duties:

(1) To promulgate suitable rules and regulations to carry out the provisions and purposes of this chapter;

(2) To request from the Attorney General, the Department of Public Safety, the Georgia Bureau of Investigation, district attorneys, solicitors-general, judges, county and municipal law enforcement agencies, and any other agency or department such assistance and data as will enable the board to determine the needs state wide for victim compensation and whether, and the extent to which, a claimant qualifies for an award. Any person, agency, or department listed in this paragraph is authorized to provide the board with the information requested upon receipt of a request from the board. Any provision of law providing for confidentiality of records shall not apply to a request of the board pursuant to this Code section; provided, however, that the board shall preserve the confidentiality of any such records received;

(3) To hear and determine all appeals of denied claims for awards filed with the board pursuant to this chapter and to reinvestigate or reopen cases as the board deems necessary, including circumstances when it appears a claim may be time barred;

(4) To apply for funds from, and to submit all necessary forms to, any federal agency participating in a cooperative program to compensate victims of crimes and to receive and administer federal funds for the purposes of this chapter;

(5) To render awards to victims of crimes or to those other persons entitled to receive awards in the manner authorized by this chapter. Victim compensation payments may be made directly to direct service providers who are not the recipients of local, state, federal, or private grant funds awarded for purposes of providing direct services to victims of crimes. A victim or claimant may be paid directly in the case of lost wages, loss of support, and instances where the victim or claimant has paid the direct service provider and is filing for reimbursement. In all cases where the victim has incurred out-of-pocket expenses, such as lost wages or loss of support, or in cases where the victim or claimant has paid the direct service provider directly and is filing for reimbursement, the victim or claimant shall be paid first before any third party;

(6) To carry out programs designed to inform the public of the purposes of this chapter; and

(7) To render each year to the Governor and to the General Assembly a written report of its activities pursuant to this chapter.

(b) The board shall assist applicants with their claims for compensation through educational programs and administrative assistance. (Code 1981, § 17-15-4, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1992, p. 2426, § 2; Ga. L. 1994, p. 1800, § 3; Ga. L. 1996, p. 748, § 16; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, substituted "records shall" for "records does" in the last sentence of paragraph (a)(2); added ", including circumstances when it appears a claim may be time barred" at the end of paragraph (a)(3); substituted "crimes" for "crime" in paragraph (a)(4); and in paragraph (a)(5), substituted "victims of crimes" for "crime victims" in the second sentence and added a comma following "loss of support" in the last sentence.

17-15-5. Filing of claims; verification; contents.

(a) A claim may be filed by a person eligible to receive an award, as provided in Code Section 17-15-7, or, if such person is a minor, by his or her parent or guardian. In any case in which the person entitled to make a claim is mentally incompetent, the claim may be filed on his or her behalf by his or her guardian. In any case in which the person entitled to make a claim is deceased, the claim may be filed on his or her behalf by an individual authorized to administer his or her estate.

(b)(1) A claim shall be filed by a victim not later than three years after the occurrence of the crime upon which such claim is based or not later than three years after the death of the victim; provided, however, that if such victim was a minor at the time of the commission of the crime, he or she shall have until three years after his or her eighteenth birthday to file such claim; and provided, further, that upon good cause shown, the board may extend the time for filing a claim.

(2) Claims shall be filed in the office of the board in person or by mail.

(c) The claim shall be verified and shall contain the following:

(1) A description of the date, nature, and circumstances of the crime;

(2) A complete financial statement, including, but not limited to, the cost of medical care or burial expense, the loss of wages or support the claimant has incurred or will incur, any other emergency expenses incurred by the claimant, and the extent to which the

claimant has been or may be indemnified for these expenses from any source;

(3) When appropriate, a statement indicating the extent of a victim's disability resulting from the injury or serious mental or emotional trauma incurred;

(4) An authorization permitting the board to verify the contents of the application; and

(5) Such other information as the board may require. (Code 1981, § 17-15-5, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1997, p. 481, § 2; Ga. L. 2005, p. 88, § 6/HB 172; Ga. L. 2009, p. 195, § 3/SB 172; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, in subsection (a), inserted "or her" in the first sentence and substituted the present provisions of the second sentence for the former provisions, which read: "In any case in which the person entitled to make a claim is mentally incompetent, the claim may be filed on his behalf by his guardian or such other individual authorized to administer his estate."; substituted the present provisions of subsection (b) for the former provisions, which read: "A claim must be filed by the claimant not later than one year after the occurrence of the crime upon which such claim is based or not later than one year after the death of the victim; provided, however, that, upon good cause shown, the board may extend that time for filing for a period not exceeding three years after such occurrence. Claims shall be filed in the office of the board in person or by mail."; substituted "claimant" for "victim" in three places in paragraph (c)(2); and substituted "a victim's disability" for "any disability" in paragraph (c)(3).

17-15-6. Investigation; decision by director; review by board; report to claimant.

(a) A claim, once accepted for filing and completed, shall be assigned to an investigator. The investigator shall examine the papers filed in support of the claim and cause an investigation to be conducted into the validity of the claim. The investigation shall include, but shall not be limited to, an examination of law enforcement, court, and official records and reports concerning the crime and an examination of medical, psychiatric, counseling, financial, and hospital reports relating to the injury, serious mental or emotional trauma, or loss upon which the claim is based. All claims arising from the death of an individual as a direct result of a crime shall be considered together by a single investigator.

(b) Claims shall be investigated and determined regardless of whether a perpetrator has been apprehended, prosecuted, or convicted of any crime based upon the same incident or whether the alleged perpetrator has been acquitted or found not guilty of the crime in question.

(c) The investigator conducting the investigation shall file with the director a written report setting forth a recommendation and the

investigator's reason therefor. The director shall render a decision and furnish the claimant with a copy of the report if so requested. In cases where an investigative report is provided, information deemed confidential in nature shall be excluded.

(d) The claimant may, within 30 days after receipt of the report of the decision of the director, make an application in writing to the director for review of the decision.

(e) Upon receipt of an application for review pursuant to subsection (d) of this Code section, the director shall forward all relevant documents and information to the board. The board shall review the records and shall affirm or modify the decision of the director. If considered necessary by the board or if requested by the claimant, the board shall order a hearing prior to rendering a decision. At the hearing, any relevant evidence not legally privileged shall be admissible. The board shall render a decision within 90 days after completion of the investigation. If the director receives no application for review pursuant to subsection (d) of this Code section, the director's decision shall become final.

(f) The board, for purposes of this chapter, may subpoena witnesses, administer or cause to be administered oaths, and examine such parts of the books and records of the parties to proceedings as relate to questions in dispute.

(g) The director shall, within ten days after receipt of the board's final decision, make a report to the claimant, including a copy of the final decision and the reasons why the decision was made. (Code 1981, § 17-15-6, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1990, p. 8, § 17; Ga. L. 1994, p. 1800, § 4; Ga. L. 2009, p. 195, § 4/SB 172; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, in subsection (a), inserted "shall" preceding "not be limited" in the second sentence and substituted "crime shall" for "crime must" in the fourth sentence; in subsection (b), substituted "Claims shall" for "Claims must", substituted "a perpetrator" for "the alleged criminal" and substituted "perpetrator" for "criminal"; in subsection (c), deleted "victim or" preceding "claimant" in the second sentence; and in subsection (e), inserted "shall" preceding "affirm" in the second sentence, substituted "privileged shall be admissible" for "privileged is admissible" in the fourth sentence, and substituted "shall become" for "becomes" in the last sentence.

17-15-7. Persons eligible for awards.

(a) Except as otherwise provided in this Code section, the following persons shall be eligible for awards pursuant to this chapter:

(1) A person who:

(A) Is injured physically, who dies, or who suffers financial hardship as a result of being injured physically as a direct result of a crime;

(B) Suffers a serious mental or emotional trauma as a result of being threatened with a crime which could result in physical injury or death;

(C) Suffers a serious mental or emotional trauma as a result of being present during the commission of a crime;

(D) Suffers a serious mental or emotional trauma as a result of being trafficked for labor servitude or sexual servitude as defined in Code Section 16-5-46; or

(E) Is a dependent spouse or child of a person who is injured physically, who dies, or who suffers financial hardship as a result of being injured physically as a direct result of a crime;

(2) For purposes of an award under subsection (k) of Code Section 17-15-8, any member of the immediate family of a victim of homicide by vehicle caused by a violation of Code Section 40-6-391;

(3) Any person who goes to the aid of another and suffers physical injury, serious mental or emotional trauma, or death as a direct result of acting, not recklessly, to prevent the commission of a crime, to apprehend lawfully a person reasonably suspected of having committed a crime, or to aid the victim of a crime or any person who is injured, traumatized, or killed while aiding or attempting to aid a law enforcement officer in the prevention of a crime or apprehension of a criminal at the officer's request;

(4) Any person who is a victim of family violence as defined by Code Section 19-13-1 and anyone who is a victim as a result of a violation of Code Section 40-6-391; or

(5) Any person who is not a direct service provider and who assumes the cost of an eligible expense of a victim regardless of such person's relationship to the victim or whether such person is a dependent of the victim.

(b)(1) Victims may be legal residents or nonresidents of this state. A surviving spouse, parent, or child who is legally dependent for his or her principal support upon a deceased victim shall be entitled to file a claim under this chapter if the deceased victim would have been so entitled, regardless of the residence or nationality of the surviving spouse, parent, or child.

(2) Victims of crimes occurring within this state who are subject to federal jurisdiction shall be compensated on the same basis as resident victims of crimes.

(c) No award of any kind shall be made under this chapter to a victim injured while confined in any federal, state, county, or municipal jail, prison, or other correctional facility.

(d) No award of any kind shall be made under this chapter to a victim of a crime which occurred prior to July 1, 1989.

(e) A person who is criminally responsible for the crime upon which a claim is based or is an accomplice of such person shall not be eligible to receive an award with respect to such claim; provided, however, that such ineligibility shall not apply if the person is as defined in subparagraph (a)(1)(D) of this Code section.

(f) There shall be no denial of compensation to a claimant based on that victim's or claimant's familial relationship with the person who is criminally responsible for the crime.

(g) No award of any kind shall be made under this chapter to a victim of a crime for loss of property.

(h) A victim or claimant who has been convicted of a felony involving criminally injurious conduct and who is currently serving a sentence therefor shall not be considered eligible to receive an award under this chapter. For purposes of this subsection, "criminally injurious conduct" means a crime which occurs or is attempted in this state that results in physical injury, serious mental or emotional trauma, or death to a victim, which act is punishable by fine, imprisonment, or death. Such term shall not include acts arising out of the operation of motor vehicles, boats, or aircraft unless the acts were committed with the intent to inflict injury, trauma, or death or unless the acts committed were in violation of Code Section 40-6-391. For the purposes of this subsection, a person shall be deemed to have committed criminally injurious conduct notwithstanding that by reason of age, insanity, drunkenness, or other reason, he or she was legally incapable of committing a crime. (Code 1981, § 17-15-7, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 2426, § 3; Ga. L. 1994, p. 1800, § 5; Ga. L. 1997, p. 481, § 3; Ga. L. 2004, p. 709, § 3; Ga. L. 2009, p. 195, § 5/SB 172; Ga. L. 2011, p. 217, § 5/HB 200; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, in subsection (a), substituted "persons shall be" for "persons are" in the introductory paragraph; substituted "person who" for "victim" in paragraph (a)(1); added subparagraphs (a)(1)(A) through (a)(1)(E); deleted former paragraph (a)(2), which read: "A dependent spouse or child of a victim;"; redesignated former paragraph (a)(2.1) as present paragraph (a)(2); inserted "a" preceding "crime or apprehension" near the end of paragraph (a)(3); substituted "victim shall be" for "victim is" in the second sentence of paragraph (b)(1); substituted "crimes" for "crime" at the end of paragraph (b)(2); substituted "person is as defined in subparagraph (a)(1)(D) of this Code section" for "claimant is a victim as defined in subparagraph (D) of paragraph (10) of Code Section 17-15-2" near the end of subsection (e); in subsection (f), substituted "claimant" for "victim" and inserted "or claimant's" following "victim's"; and substituted "means a crime"

for "means an act" in the second sentence of subsection (h).

17-15-8. Required findings; amount of award; rejection of claim; reductions; exemption from garnishment and execution; exemption from treatment as ordinary income; effective date for awards; psychological counseling for relatives of deceased; memorials for victims of DUI homicide.

(a) No award may be made unless the board or director finds that:

(1) A crime was committed;

(2) The crime directly resulted in the victim's physical injury, serious mental or emotional trauma, or financial hardship as a result of the victim's physical injury, serious mental or emotional trauma, or the victim's death;

(3) Police records, records of an investigating agency, or records created pursuant to a mandatory reporting requirement show that the crime was promptly reported to the proper authorities. In no case may an award be made where the police records, records of an investigating agency, or records created pursuant to a mandatory reporting requirement show that such report was made more than 72 hours after the occurrence of such crime unless the board, for good cause shown, finds the delay to have been justified and provided, further, that good cause shall be presumed if the person is eligible for awards pursuant to this chapter corresponding to subparagraph (a)(1)(D) of Code Section 17-15-7; and

(4) The applicant has pursued restitution rights against any person who committed the crime unless the board or director determines that such action would not be feasible.

(a.1) The board, upon finding that any claimant or award recipient has not fully cooperated with all law enforcement agencies, may deny, reduce, or withdraw any award.

(b) Any award made pursuant to this chapter shall be in an amount not exceeding actual expenses, including indebtedness reasonably incurred for medical expenses, loss of wages, funeral expenses, mental health counseling, or support for dependents of a deceased victim necessary as a direct result of the injury or hardship upon which the claim is based.

(c)(1) Notwithstanding any other provisions of this chapter, no award made under the provisions of this chapter shall exceed $1,000.00 in the aggregate; provided, however, that with respect to any claim filed with the board as a result of a crime occurring on or after July 1,

1994, no award made under the provisions of this chapter payable to a claimant sustaining economic loss because of injury to or death of a victim shall exceed $5,000.00 in the aggregate; provided, further, that with respect to any claim filed with the board as a result of a crime occurring on or after July 1, 1995, no award made under the provisions of this chapter payable to a claimant sustaining economic loss because of injury to or death of a victim shall exceed $10,000.00 in the aggregate; provided, further, that with respect to any claim filed with the board as a result of a crime occurring on or after July 1, 2002, no award made under the provisions of this chapter payable to a claimant sustaining economic loss because of injury to or death of a victim shall exceed $25,000.00 in the aggregate; provided, further, that with respect to any claim filed with the board for serious mental or emotional trauma, no award shall be made for a crime occurring before July 1, 2009.

(2) No award under this chapter for the following losses shall exceed the maximum amount authorized:

Category	Maximum Award
Lost wages	$ 10,000.00
Funeral expenses	3,000.00
Financial hardship or loss of support	10,000.00
Medical	15,000.00
Counseling	3,000.00
Crime scene sanitization	1,500.00

(d) In determining the amount of an award, the director and board shall determine whether because of his or her conduct the victim contributed to the infliction of his or her injury, serious mental or emotional trauma, or financial hardship, and the director and board may reduce the amount of the award or reject the claim altogether in accordance with such determination.

(e) The director and board may reject an application for an award when the claimant has failed to cooperate in the verification of the information contained in the application.

(f) Any award made pursuant to this chapter may be reduced by or set off by the amount of any payments received or to be received as a result of the injury, serious mental or emotional trauma:

(1) From or on behalf of the person who committed the crime; and

(2) From any other private or public source, including an award of workers' compensation pursuant to the laws of this state,

provided that private sources shall not include contributions received from family members or persons or private organizations making charitable donations to a claimant.

(g) No award made pursuant to this chapter shall be subject to garnishment, execution, or attachment other than for expenses resulting from the injury or serious mental or emotional trauma which is the basis for the claim.

(h) An award made pursuant to this chapter shall not constitute a payment which is treated as ordinary income under either the provisions of Chapter 7 of Title 48 or, to the extent lawful, under the United States Internal Revenue Code.

(i) Notwithstanding any other provisions of this chapter to the contrary, no awards from state funds shall be paid to a claimant for a crime which occurred prior to July 1, 1989.

(j) In any case where a crime results in death, the spouse, children, parents, or siblings of such deceased victim may be considered eligible for an award for the cost of psychological counseling which is deemed necessary as a direct result of said criminal incident. The maximum award for said counseling expenses shall not exceed $3,000.00 for each claimant identified in this subsection.

(k)(1) In addition to any other award authorized by this Code section, in any case where a deceased was a victim of homicide by vehicle caused by a violation of Code Section 40-6-391 on any road which is part of the state highway system, upon request of the next of kin of the deceased, an award of compensation in the form of a memorial sign erected by the Department of Transportation as provided by this subsection shall be paid to an eligible claimant.

(2) The provisions of paragraph (4) of subsection (a) of this Code section shall not apply for purposes of eligibility for awards made under this subsection, and the value of any award paid to a claimant under this subsection shall not apply toward or be subject to any limitation on award amounts paid to any claimant under other provisions of this Code section.

(3) The Department of Transportation, upon receiving payment for the cost of materials and labor from the board, shall upon request of the next of kin of the deceased erect a sign memorializing the deceased on the right of way of such public highway at the location of the accident or as near thereto as safely and reasonably possible and shall maintain such sign for a period of five years from the date the sign is erected unless its earlier removal is requested in writing by the next of kin. Such sign shall be 24 inches wide by 36 inches high and depict a map of the State of Georgia, with a dark blue background

and a black outline of the state boundaries. A border of white stars shall be placed on the inside of the state boundaries, and the sign shall contain the words "In Memory of (name), DUI Victim (date of accident)."

(4) In the event of multiple such claims arising out of a single motor vehicle accident, the names of all deceased victims for whom such claims are made and for whom a request has been made by the next of kin of the deceased may be placed on one such sign or, if necessary, on one such sign and a plaque beneath of the same color as the sign. In the event of multiple claims relating to the same deceased victim, no more than one such sign shall be paid for and erected for such victim. (Code 1981, § 17-15-8, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 2426, §§ 4, 5; Ga. L. 1994, p. 1800, § 6; Ga. L. 1995, p. 385, § 1; Ga. L. 1997, p. 481, § 4; Ga. L. 2002, p. 843, § 3; Ga. L. 2004, p. 631, § 17; Ga. L. 2004, p. 709, § 4; Ga. L. 2009, p. 195, § 6/SB 172; Ga. L. 2011, p. 217, § 6/HB 200; Ga. L. 2014, p. sb0187, § 1/SB 187; Ga. L. 2014, p. 354, § 17/SB 340.)

The 2014 amendments. — The first 2014 amendment, effective July 1, 2014, substituted "if the person is eligible for awards pursuant to this chapter corresponding to subparagraph (a)(1)(D) of Code Section 17-15-7" for "if the claimant is a victim as defined in subparagraph (D) of paragraph (10) of Code Section 17-15-2" near the end of paragraph (a)(3); designated the ending paragraph of subsection (a) as subsection (a.1); substituted "chapter shall" for "chapter may" near the beginning of subsection (b); in paragraph (c)(1), inserted "that" following "provided, however,", inserted "that" following "provided, further," throughout, substituted "payable to a claimant" for "payable to a victim and to all other claimants" in three places, and substituted "a victim shall exceed" for "such victim shall exceed" in three places; deleted "of such crime" following "conduct the victim" in subsection (d); substituted "claimant" for "victim" at the end of subsection (f); substituted "chapter shall be" for "chapter is" in subsection (g); and inserted "to a claimant for a crime which occurred" in subsection (i). The second 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, substituted "that with respect" for "with respect" in paragraph (c)(1).

17-15-9. Georgia Crime Victims Emergency Fund created; administration; moneys; payments authorized.

(a) There is created a fund to be known as the Georgia Crime Victims Emergency Fund. The custodian of the fund shall be the board. The director shall administer the fund and may invest the resources of the fund in the same manner and fashion that an insurer authorized to issue contracts of life insurance is authorized to invest its resources. The board shall be specifically authorized to contract with any person or organization, public or private, to administer the fund, assume the powers of the director, and carry out the duties of the board relating to the fund.

(b)(1) The fund shall consist of all moneys received pursuant to Article 7 of Chapter 21 of Title 15 from the assessment of additional penalties in cases involving a violation of Code Section 40-6-391 or a violation of an ordinance of a political subdivision of this state which has adopted by reference Code Section 40-6-391 pursuant to Article 14 of Chapter 6 of Title 40.

(2) The funds placed in the fund shall also consist of all moneys appropriated by the General Assembly, if any, for the purpose of compensating claimants under this chapter and money recovered on behalf of the state pursuant to this chapter by subrogation or other action, recovered by court order, received from the federal government, received from additional court costs, received from specific tax proceeds allocated to the fund, received from other assessments or fines, or received from any other public or private source pursuant to this chapter.

(c) All funds appropriated to or otherwise paid into the fund shall be presumptively concluded to have been committed to the purpose for which they have been appropriated or paid and shall not lapse.

(d) The board shall be authorized, subject to the limitations contained in this chapter, to pay the appropriate compensation to the persons eligible for compensation under this chapter from the proceeds of the fund.

(e) After determining that an award should be paid and the method of payment, the board or director, within five days, shall be authorized to draw a warrant or warrants upon the fund to pay the amount of the award from such fund. (Code 1981, § 17-15-10, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1992, p. 1836, § 2; Ga. L. 1993, p. 91, § 17; Code 1981, § 17-15-9, as redesignated by Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, redesignated former Code Section 17-15-10 as present Code Section 17-15-9; substituted "board shall be" for "board is" near the beginning of the last sentence in subsection (a) and in subsection (d); deleted ", relating to driving under the influence of alcohol or drugs," following "Code Section 40-6-391" in paragraph (b)(1); and substituted "fund" for "Georgia Crime Victims Emergency Fund" at the end of subsection (d) and near the end of subsection (e).

Editor's notes. — This Code section formerly pertained to payment where insufficient funds in Georgia Crime Victims Emergency Fund. The former Code section was based on Code 1981, § 17-15-9, enacted by Ga. L. 1988, p. 591, § 1, and was repealed by Ga. L. 2014, p. 354, § 1/SB 187, effective July 1, 2014.

17-15-10. Insufficient funds to pay authorized award.

Notwithstanding any other provision of this chapter to the contrary, where an award under this chapter has been authorized but there are not sufficient funds in the fund to pay or continue paying the award,

then the award or the remaining portion thereof shall not be paid unless and until sufficient funds become available from the fund, and at such time, awards which have not been paid shall begin to be paid in chronological order with the oldest award being paid first. In the event an award was to be paid in installments and some remaining installments have not been paid due to a lack of funds, then when funds due become available, that award shall be paid in full when its appropriate time for payment comes on the chronological list before any other postdated award shall be paid. Any award under this chapter is specifically not a claim against the state if it cannot be paid due to a lack of funds in the fund. (Code 1981, § 17-15-10, enacted by Ga. L. 2014, p. 354, § 1/SB 187.)

Effective date. — This Code section became effective July 1, 2014.

Editor's notes. — Ga. L. 2014, p. 354, § 1/SB 187, effective July 1, 2014, redesignated former Code Section 17-15-10 as present Code Section 17-15-9. Former Code Section 17-15-10 pertained to the creation of the Georgia Crime Victims Emergency Fund, administration, moneys, and payments authorized.

17-15-11. False claims.

Any person who asserts a false claim under the provisions of this chapter shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as for a misdemeanor and shall further forfeit any benefit received and shall reimburse and repay the state for payments received or paid on his or her behalf pursuant to any of the provisions of this chapter. (Code 1981, § 17-15-11, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, inserted "or her" near the end of this Code section.

17-15-12. Effect of accepting award.

(a) Acceptance of an award made pursuant to this chapter shall subrogate the state, to the extent of such award, to any right or right of action occurring to the claimant to recover payments on account of losses resulting from the crime with respect to which the award is made. The board may waive subrogation when the claimant presents documentation and the board verifies that judgment, settlement, or other sources have not fully reimbursed the claimant for expenses compensable under this chapter.

(b) Acceptance of an award made pursuant to this chapter based on damages from a crime shall constitute an agreement on the part of the recipient reasonably to pursue any and all civil remedies arising from any right of action against the person or persons responsible for or

committing the crime. (Code 1981, § 17-15-12, enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 2008, p. 486, § 4/HB 1297; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, in subsection (a), deleted "or the victim" following "the claimant" in the first sentence and deleted "victim or" preceding "claimant" twice in the second sentence; and in subsection (b), substituted "crime" for "criminal act" near the middle and substituted "crime" for "act" at the end.

17-15-13. Debt to state created; payment as condition of probation or parole; payment into fund.

(a) Any award or payment of benefits under this chapter shall create a debt due and owing to the state by any person found in a court of competent jurisdiction of this state to have committed an act resulting in compensation being paid pursuant to this chapter.

(b) A court, when placing on probation any person who owes a debt to the state as a consequence of a crime, may set as a condition of probation the payment of the debt or a portion of the debt to the state. The court may also set the schedule or amounts of payments subject to modification based on change of circumstances.

(c) The State Board of Pardons and Paroles shall also have the right to make payment of the debt or a portion of the debt to the state a condition of parole.

(d) When a child is adjudicated for committing a delinquent act in a juvenile court proceeding involving a crime upon which a claim under this chapter can be made, the juvenile court in its discretion may order that the child pay the debt to the state as an adult would have to pay had an adult committed the crime. Any assessments so ordered may be made a condition of probation as provided in Code Section 15-11-601.

(e) Payments authorized or required under this Code section shall be paid into the fund. The board shall coordinate the development of policies and procedures for the State Board of Pardons and Paroles and the Administrative Office of the Courts to assure that restitution programs are administered in an effective manner to increase payments into the fund.

(f) In every case where an individual is serving under active probation supervision and paying a supervision fee, $9.00 per month shall be added to any supervision fee collected by any entity authorized to collect such fees and shall be paid into the fund. This subsection shall apply to probationers supervised under either Code Section 42-8-20 or 42-8-100. The probation supervising entity shall collect and forward the $9.00 fee to the board by the end of each month. (Code 1981, § 17-15-13,

enacted by Ga. L. 1988, p. 591, § 1; Ga. L. 1998, p. 840, § 1; Ga. L. 2000, p. 20, § 9; Ga. L. 2002, p. 843, § 4; Ga. L. 2013, p. 294, § 4-20/HB 242; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, in subsection (a), deleted "to, or on behalf of, a victim or eligible family member" following "payment of benefits" and substituted "an act resulting in compensation being paid pursuant to this chapter" for "such criminal act"; substituted "crime" for "criminal act" in the first sentence of subsection (b); substituted "fund" for "Georgia Crime Victims Emergency Fund" in the first sentence of subsections (e) and (f); deleted "victim" preceding "restitution" in the last sentence of subsection (e); and substituted "board" for "Georgia Crime Victims Compensation Board" in the last sentence of subsection (f).

JUDICIAL DECISIONS

Restitution award not supported by evidence. — Trial court erred in ordering the defendant to pay restitution in the amount of $7,584.35 to the Crime Victim Compensation Program and $1,000 in token restitution to the victim because the record contained no evidence to support the awards as the state presented no evidence supporting the state's request for $7,584.35, and the record did not show that the trial court considered the factors outlined in O.C.G.A. § 17-14-10(a) before requiring restitution as a condition of probation. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

17-15-14. Funding to victim service providers for disseminating information.

The board shall be authorized to designate and expend not more than 10 percent of the moneys collected and paid into the fund pursuant to paragraph (1) of subsection (b) of Code Section 17-15-9 and Code Section 17-15-13 to provide funding to victim service providers for the purpose of disseminating materials regarding the availability of the compensation program provided in this chapter and public information purposes regarding the compensation program provided in this chapter. (Code 1981, § 17-15-14, enacted by Ga. L. 1994, p. 1800, § 7; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, substituted "Code Section 17-15-9" for "Code Section 17-15-10", substituted "the compensation program provided in this chapter" for "compensation for victims of crime", and deleted "victim" preceding "compensation" near the end.

17-15-15. Responsibility for cost of forensic medical examination.

When a forensic medical examination is conducted, the cost of such forensic medical examination shall be paid for by the fund in an amount not to exceed $1,000.00. The fund shall be responsible for payment of such cost notwithstanding whether the person receiving such forensic medical examination has health insurance or any other source of health

care coverage. (Code 1981, § 17-15-15, enacted by Ga. L. 2011, p. 214, § 5/HB 503; Ga. L. 2014, p. 354, § 1/SB 187.)

The 2014 amendment, effective July 1, 2014, inserted "forensic medical" in the first and second sentences.

17-15-16. Funding for costs of forensic interviews for persons less than 18 years of age or developmentally disabled.

(a) When a forensic interview is conducted and when funding is available, the cost of such interview for a person who is less than 18 years of age or developmentally disabled may be paid for by the fund in an amount to be determined by the board.

(b) The board shall develop standards, protocols, and guidelines related to reimbursement of forensic interview providers.

(c) The board shall establish an annual limit of:

(1) The amount that may be paid from the fund:

(2) The amount that may be reimbursed for each interview; and

(3) The limit on the number of interviews that will be reimbursable from the fund.

(d) Funding may be used only when:

(1) The results of the forensic interview will be for identification of the interviewee's needs, including social services, personal advocacy, case management, substance abuse treatment, and mental health services;

(2) The forensic interviews are conducted in the context of a multidisciplinary investigation and diagnostic team, or in a specialized setting such as a child advocacy center; and

(3) The interviewer is trained to conduct forensic interviews appropriate to the developmental age and abilities of children, or the developmental, cognitive, and physical or communication disabilities presented by adults. (Code 1981, § 17-15-16, enacted by Ga. L. 2014, p. 354, § 1/SB 187.)

Effective date. — This Code section became effective July 1, 2014.

CHAPTER 16

DISCOVERY

ARTICLE 1

DEFINITIONS; FELONY CASES

17-16-1. Definitions.

JUDICIAL DECISIONS

Cited in Morris v. State, 324 Ga. App. 756, 751 S.E.2d 551 (2013).

17-16-2. Applicability of article.

JUDICIAL DECISIONS

Defendant's failure to give notice to the prosecuting attorney.

The state was not required to give notice of the state's intent to use a prior conviction in the sentencing hearing since the defendant did not provide the required notice. Kiser v. State, 2014 Ga. App. LEXIS 119 (Mar. 7, 2014).

17-16-4. Disclosure required by prosecuting attorney and defendant; inspections allowed; reducing oral reports to writing; continuing duty to disclose; discovery creating threat of physical or economic harm.

JUDICIAL DECISIONS

Analysis

General Consideration
State's Duty to Comply
State's Duty to Comply with Request

General Consideration

Constitutionality.

Defendant, who was charged with child pornography, did not suffer a due process violation due to the U.S. Attorney's office not responding to letters seeking assurance that the defendant's expert would not be prosecuted under federal pornography laws for examining the defendant's computer hard drive; the trial court ordered that the expert be provided with a copy of the defendant's computer hard drive, and the trial court's order requiring written assurances from United States Attorneys of nonprosecution of the expert for any potential violations of federal child pornography statutes exceeded the trial court's authority. The trial court's finding that O.C.G.A. § 17-16-4(a)(3)(B) was unconstitutional as applied to the defendant because the statute deprived the defendant of due process rights was not challenged by the state on appeal. Morris v. State, 324 Ga. App. 756, 751 S.E.2d 551 (2013).

Notice of intent sufficient for recidivist punishment.

Because the evidence showed that the state notified the defendant of the state's continuing intention to use the defen-

dant's prior convictions in aggravation of punishment at the second trial, and the defendant was aware of that intention, the defendant's motion for new trial on the ground that the state had failed to provide new written notices of recidivism to the defendant after the first trial was denied. Thomas v. State, 324 Ga. App. 898, 752 S.E.2d 67 (2013).

Failure to obtain recidivist notice of accomplice. — Defendant's counsel was not ineffective for failing to obtain a copy of the recidivist notice filed against an accomplice because a recidivist notice indicated only possible sentences, and because the trial court ruled that no inquiry into such possible penalties was allowed in the accomplice's cross-examination, there was no likelihood of prejudice to the defendant as a result of counsel's failure to obtain the notice. Jackson v. State, 294 Ga. 34, 751 S.E.2d 63 (2013).

State's Duty to Comply

State's discovery obligations met.

Four boxes of documents were properly admitted into evidence despite the defendant's claim that the documents had not been made available during discovery because the documents had been provided to previous trial counsel and counsel and an associate were given a break during trial to review the documents. Raymond v. State, 322 Ga. App. 404, 745 S.E.2d 689 (2013).

Trial court did not err in denying defendant's motion for a new trial based on the prosecution's failure to disclose the existence of certain documents because the prosecutor gave notice to the defendant that the physical objects were available for inspection, copying, or photographing and O.C.G.A. § 17-16-4(a)(3)(A) did not require the state to take the initiative and furnish the defense with copies of physical evidence. Ananaba v. State, 755 S.E.2d 225, 2014 Ga. App. LEXIS 80 (2014).

Plain language of O.C.G.A. § 17-16-4(a)(3)(A) does not require the state to take the initiative and furnish the defense with copies of physical evidence; the state fulfills the state's obligation by making the evidence available to the defense to inspect and copy. Ananaba v. State, 755 S.E.2d 225, 2014 Ga. App. LEXIS 80 (2014).

State's Duty to Comply with Request

Defendant's remedy for noncompliance.

Proper remedy for the state's failure to comply with O.C.G.A. § 17-16-4(a)(4) was to postpone the testimony of the state's blood spatter expert until late in the trial as the trial court did, pursuant to O.C.G.A. § 17-16-6. Further, by failing to ask for more time to prepare for the expert, the defendant waived any claim of error. Valentine v. State, 293 Ga. 533, 748 S.E.2d 437 (2013).

17-16-5. Alibi witnesses.

JUDICIAL DECISIONS

Failure to timely come forward with alibi defense.

Exclusion of alibi evidence was not error as the defendant failed to notify the state of the alibi until the day of trial, despite the prosecutor's request for such evidence no more than five days prior to trial. Rembert v. State, 324 Ga. App. 146, 749 S.E.2d 744 (2013).

17-16-6. Failure to comply with discovery requirements.

JUDICIAL DECISIONS

Failure to timely come forward with alibi defense.

Exclusion of alibi evidence was not error as the defendant failed to notify the state of the alibi until the day of trial, and the finding that the defendant acted in bad

faith was supported by the fact that the defendant presumably knew of an alibi when arrested but did not tell the arresting or investigating officers and neither alibi witness came forward to tell the prosecution or defense counsel of the alibi. Rembert v. State, 324 Ga. App. 146, 749 S.E.2d 744 (2013).

Delaying expert witness's testimony as remedy. — Proper remedy for the state's failure to comply with O.C.G.A. § 17-16-4(a)(4) was to postpone the testimony of the state's blood spatter expert until late in the trial as the trial court did, pursuant to O.C.G.A. § 17-16-6. Further, by failing to ask for more time to prepare for the expert, the defendant waived any claim of error. Valentine v. State, 293 Ga. 533, 748 S.E.2d 437 (2013).

Exclusion of witness was error.

Trial court erred in excluding testimony from two witnesses who came forward after the trial had started, because defense counsel could not have disclosed them prior to trial due to a lack of knowledge that they existed, and thus, there was no bad faith on the part of defense counsel. Mitchell v. State, 755 S.E.2d 308, 2014 Ga. App. LEXIS 163 (Mar. 17, 2014).

Mistrial not required.

With regard to the defendant's murder conviction, the defendant was not entitled to a mistrial because the state failed to provide an accomplice's statement about an alleged conversation between the defendant and a codefendant indicating a consciousness of guilt as the record showed that the witness was available to the parties for interview through an attorney prior to trial and the testimony provided at trial had not been reduced to a writing or otherwise recorded, but rather had been revealed during an interview the state conducted for the purposes of trial preparation; thus, there was nothing for the state to produce during discovery. Lewis v. State, 293 Ga. 110, 744 S.E.2d 21 (2013).

Failure to request relief.

Defendant failed to show prejudice as a result of the trial court's failure to exclude testimony of the surviving victim based on an alleged discovery violation because, inter alia, the defendant did not seek a recess or continuance or seek any other remedy under O.C.G.A. § 17-16-6. Falay v. State, 320 Ga. App. 781, 740 S.E.2d 738 (2013).

Testimony properly admitted. — Despite the fact that the state failed to notify the defendant of a similar transaction action witness more than 10 days before trial, the admission of the testimony was not erroneous as the prosecutor indicated that the defense was informed of the witness as soon as the prosecutor got the evidence and defense counsel was given an opportunity to interview the witness prior to the witness's testimony. Johnson v. State, 322 Ga. App. 612, 744 S.E.2d 903 (2013).

17-16-7. Statements of witnesses.

JUDICIAL DECISIONS

Failure of the state to produce oral statements.

Admission of a witness's testimony regarding the defendant's oral statement that someone had put something in the defendant's drink was not error as the statement was oral and subject to the disclosure requirements of O.C.G.A. § 17-16-7 and, even assuming there had been error, it was harmless given the other evidence in the case. Simmons v. State, 321 Ga. App. 743, 743 S.E.2d 434 (2013).

Statutory obligation of O.C.G.A. § 17-16-7 was not triggered when a witness merely made an oral statement and thus, the state was not obliged to inform the defendant that the victim had been taken for a medical exam until the state received written confirmation of the exam. Whatley v. State, 755 S.E.2d 885, 2014 Ga. App. LEXIS 126 (2014).

No duty to disclose.

Defendant's contention that trial counsel was ineffective for failing to move to suppress the identification by a victim prior to trial, object to the in-court identification of the defendant, or move for a

mistrial because the state allegedly failed to provide notice that the victim could identify the defendant failed because the defendant knew the victim before the armed robbery, thus, there was an independent basis for the in-court identification, making futile any objection to the testimony. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

CHAPTER 17

CRIME VICTIMS' BILL OF RIGHTS

17-17-7. Notification to victim of accused's arrest and proceedings where accused's release is considered; victim's right to express opinion in pending proceedings and to file written complaint in event of release.

(a) Whenever possible, the investigating law enforcement agency shall give to a victim prompt notification as defined in paragraph (9) of Code Section 17-17-3 of the arrest of an accused.

(b) The arresting law enforcement agency shall promptly notify the investigating law enforcement agency of the accused's arrest.

(c) Whenever possible, the prosecuting attorney shall notify the victim prior to any proceeding in which the release of the accused will be considered.

(d) Whenever possible, the prosecuting attorney shall offer the victim the opportunity to express the victim's opinion on the release of the accused pending judicial proceedings.

(e)(1) Whenever possible, the custodial authority shall give prompt notification to a victim of the release of the accused.

(2) Prompt notification of release from a county or municipal jail is effected by placing a telephone call to the telephone number provided by the victim and giving notice to the victim or any person answering the telephone who appears to be sui juris or by leaving an appropriate message on a telephone answering machine.

(3) Notification of release from the custody of the state or any county correctional facility shall be in the manner provided by law.

(f) If the court has granted a pretrial release or supersedeas bond, the victim shall have the right to file a written complaint with the prosecuting attorney asserting acts or threats of physical violence or intimidation by the accused or at the accused's direction against the victim or the victim's immediate family. Based on the victim's written complaint or other evidence, the prosecuting attorney may move the court that the bond or personal recognizance of an accused be revoked. (Code 1981, § 17-17-7, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2014, p. 866, § 17/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, redesignated the introductory text of subsection (e) as paragraph (e)(1) and paragraphs (e)(1) and (e)(2) as paragraphs (e)(2) and (e)(3), respectively.

17-17-9. Exclusion of testifying victim from criminal proceedings; separate victims' waiting areas.

(a) A victim has the right to be present at all criminal proceedings in which the accused has the right to be present. A victim or member of the immediate family of a victim shall not be excluded from any portion of any hearing, trial, or proceeding pertaining to the offense based solely on the fact that such person is subpoenaed to testify unless it is established that such victim or family member is a material and necessary witness to such hearing, trial, or proceeding and the court finds that there is a substantial probability that such person's presence would impair the conduct of a fair trial. The provisions of this Code section shall not be construed as impairing the authority of a judge to remove a person from a trial or hearing or any portion thereof for the same causes and in the same manner as the rules of court or law provides for the exclusion or removal of the accused. A motion to exclude a victim or family members from the courtroom for any reason other than misconduct shall be made and determined prior to jeopardy attaching.

(b) A victim of a criminal offense who has been or may be subpoenaed to testify at such hearing or trial shall be exempt from the provisions of Code Section 24-6-615 requiring sequestration; provided, however, that the court shall require that the victim be scheduled to testify as early as practical in the proceedings.

(c) If the victim is excluded from the courtroom, the victim shall have the right to wait in an area separate from the accused, from the family and friends of the accused, and from witnesses for the accused during any judicial proceeding involving the accused, provided that such separate area is available and its use in such a manner practical. If such a separate area is not available or practical, the court, upon request of the victim made through the prosecuting attorney, shall

attempt to minimize the victim's contact with the accused, the accused's relatives and friends, and witnesses for the accused during any such judicial proceeding. (Code 1981, § 17-17-9, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2010, p. 214, § 12/HB 567; Ga. L. 2011, p. 99, § 35/HB 24; Ga. L. 2014, p. 866, § 17/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, substituted "Code Section 24-6-615" for "Code Section 24-6-616" in subsection (b).

17-17-14. Victim required to provide current address and phone number to notifying parties.

(a) It is the right and responsibility of the victim who desires notification under this chapter or under any other notification statute to keep the following informed of the victim's current address and phone number:

(1) The investigating law enforcement agency;

(2) The prosecuting attorney, until final disposition or completion of the appellate and post-conviction process, whichever occurs later;

(3) As directed by the prosecuting attorney, the sheriff if the accused is in the sheriff's custody for pretrial, trial, or post-conviction proceedings; the Department of Corrections if the accused is in the custody of the state; or any county correctional facility if the defendant is sentenced to serve time in a facility which is not a state facility; and

(4) The State Board of Pardons and Paroles.

(b) Current addresses and telephone numbers of victims and their names provided for the purposes of notification pursuant to this chapter or any other notification statute shall be confidential and used solely for the purposes of this chapter and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50, relating to inspection of public records. (Code 1981, § 17-17-14, enacted by Ga. L. 1995, p. 385, § 2; Ga. L. 2014, p. 866, § 17/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, deleted "and" at the end of paragraph (a)(2).

CHAPTER 19

GEORGIA COUNCIL ON CRIMINAL JUSTICE REFORM

17-19-1. (Repealed effective June 30, 2018) Creation; purpose.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

17-19-2. (Repealed effective June 30, 2018) Membership; terms; chairperson; staff support; funds.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

17-19-3. (Repealed effective June 30, 2018) Meetings; quorum; expense allowances.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

17-19-4. (Repealed effective June 30, 2018) Duties; powers.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

17-19-5. Sunset.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).